

97 00861



**League of
California Cities**

Proposition 218

Implementation Guide

January 1997

INSTITUTE OF GOVERNMENTAL
STUDIES LIBRARY

SEP 19 1997

UNIVERSITY OF CALIFORNIA

California Cities Work Together

This publication is provided for general information only and is not offered or intended as legal advice. Readers should seek the advice of an attorney when confronted with legal issues and attorneys should perform an independent evaluation of the issues raised in these materials. The League does not review these materials for content and has no view one way or another on the analysis contained in the materials.

Table of Contents

Part I and Acknowledgements

Taxes

• Introduction and Overview

• What is a Tax?

• Key Changes to Proposition 218 / Measure 5 Taxes

• Proposition 218 / Measure 5 Summary Table

• Procedures for Taxpayers to File or Receive a Refund

• Enforcement of the Taxpayer's Rights and the Taxpayer's Obligations

• Other Key Points

Proposition 218 Implementation Guide

• Introduction and Overview

• Key Changes to Proposition 218 / Measure 5 Taxes

• Proposition 218 / Measure 5 Summary Table

• Procedures for Taxpayers to File or Receive a Refund

• Enforcement of the Taxpayer's Rights

• Enforcement of the Taxpayer's Obligations

• Other Key Points

• Summary of Key Points

• Summary of Key Points

• Summary of Key Points

• Summary of Key Points

• Summary of Key Points

• Summary of Key Points

• Summary of Key Points

• Summary of Key Points

• Summary of Key Points

• Summary of Key Points

• Summary of Key Points

• Summary of Key Points

Copyright © 1997, by the League of California Cities, Sacramento, California

All rights reserved. This publication, or parts thereof, may not be reproduced in any form without the League's permission. For information, address the League of California Cities, 1400 K Street, 4th Floor, Sacramento, California 95814

For additional copies of this handbook, please contact the publications unit of the

League of California Cities
1400 K Street, 4th Floor
Sacramento, CA 95814
916/658-8253.

Table of Contents

Preface and Acknowledgments.....	iii
I. Taxes.....	1
• Introduction and Overview.....	1
What is a Tax?.....	1
Key Changes Proposition 218 Makes to Tax Law.....	1
• Proposition 218's Substantive Effect on Taxes.....	2
• Procedural Requirements for New or Increased Taxes.....	4
• Proposition 218's Relationship to Proposition 62 and <i>Guardino</i>	6
• Effect of Proposition 218 on Particular Types of Taxes.....	7
II. Assessments.....	9
• Introduction and Overview.....	9
What is an Assessment?.....	9
Key Changes Proposition 218 Makes to Assessment Law.....	9
• Procedures for New Assessments.....	10
General Procedures.....	10
New Majority Protest Procedures for Assessments.....	12
• What May Be Included in Assessments.....	17
• Assessment of Public Property.....	18
• Burden of Proof.....	23
• Exemptions.....	28
• Standby Charges.....	36
• Drainage, Sewer or Bridge and Thoroughfare Fees Imposed Pursuant to the Subdivision Map Act.....	38
• Use of Initiative to Reduce or Repeal Assessments.....	38
III. Property-Related Fees and Charges.....	41
• Introduction and Overview.....	41
What is a Property Related Fee or Charge?.....	41
Key Changes Proposition 218 Makes to Fee and Charge Law.....	41
• Basic Analysis.....	42

III. Property-Related Fees and Charges (continued)	
• Kinds of Fees and Charges Affected	42
• Applications/Analysis	50
Imposed On A Parcel Or On A Person As An Incident Of Property Ownership	50
Agencies	55
• Substantive Restrictions on Property-Related Fees and Charges	56
Amount of Fees	56
Restrictions on Use of Fee Revenues	59
• Procedural Requirements	62
Notice Requirements	62
Hearing Requirements	63
Voter-Approval Requirements	64
• Timing Issues	65
Substantive Provisions	65
Procedural Provisions	67
• Initiatives to Reduce or Repeal Fees	68
IV. Proposition 218's Effect On The Initiative Power	69
• Introduction and Overview	69
• Revenue Sources Potentially Affected	69
• Constitutional and Other Restrictions on the Initiative Process	73
• Procedural Issues	79
• Limits on Public Agency Communications in Elections	81
V. Legislative Issues	83
• League Legislative Process	83
• Topics for Legislative Resolution	84
VI. Attachments	
• Proposition 218 Text	A-3
• Ballot Materials (Title, Summary, Legislative Analyst's Analysis, Arguments)	A-13
• Proposition 218 Flow Chart	A-15
• Key Dates	A-19
• Howard Jarvis Taxpayers Association Annotated Version of Proposition 218	A-21
• Moody's Materials	A-37
• Legislative Analyst Post-Election Analysis on Proposition 218	A-43
• Howard Jarvis Taxpayers Association Implementation Guide	A-65

Preface

On November 5, 1996, the California electorate approved Proposition 218, the self-titled "Right to Vote on Taxes Act." Proposition 218 adds articles XIII C and XIII D to the California Constitution and makes numerous changes to local government finance law. Proposition 218 was approved by a 56.6 percent to 43.4 percent vote.

On October 15, 1996, a number of public agency officials met at the League's annual conference to discuss an implementation program in the event of Proposition 218's passage. This guide is the result of the planning that occurred at that meeting. The guide reflects the input of city managers, city attorneys, public works officials, fiscal officers, as well as water agency attorneys and county counsels.

As is often the case with new and far-reaching laws, attorneys and others disagree about a number of Proposition 218's provisions. Legislation may resolve some of the uncertainty surrounding Proposition 218. Section V of this guide describes some of the issues which may be suitable for legislative resolution.

Litigation may also resolve some of the issues. At this writing, at least one city is preparing a lawsuit to challenge elements of Proposition 218's voting provisions. Some attorneys are exploring the theory that the changes Proposition 218 makes in public finance and local government law are so sweeping as to constitute a constitutional revision (as opposed to merely an amendment). Constitutional revisions must be approved by the Legislature or constitutional convention before being subjected to a popular vote; the initiative power only extends to constitutional amendments. See Cal. Const. art. XVIII, §§ 1, 2 and 3; *Legislature of the State of California v. Eu*, 54 Cal. 3d 492, 286 Cal. Rptr. 283 (1991), cert. denied 503 U.S. 919, 112 S. Ct. 1292-1293, 117 L. Ed. 516 (1992); *Raven v. Deukmejian*, 52 Cal. 3d 336, 276 Cal. Rptr. 326 (1990).

In sum, questions concerning Proposition 218 will take years to resolve. In the meantime, public officials are charged with conducting the public's business within the constraints of Proposition 218, as best as they can discern them. This guide is an effort to assist with that task.*

* The material in this guide is offered for information only and should not be construed as legal advice. Public officials should always consult with their attorneys when confronted with issues relating to Proposition 218's interpretation or application to a given set of circumstances. This guide has not been reviewed by the League of California Cities' board of directors and does not represent an official position of the League on issues relating to Proposition 218. Statements made in this guide should not be represented to be the official position of the League in litigation or other contexts.

This page was intentionally left blank.

Acknowledgments

The League of California Cities thanks the following individuals who contributed to the production of this guide. This guide was produced in a very short time period as the result of these individuals' dedicated and energetic efforts on behalf of local public agencies in California.

Manuela Albuquerque
City Attorney, Berkeley

Steven Amerikaner
Hatch & Parent, Santa Barbara

Valerie J. Armento
City Attorney, Sunnyvale

James A. Biery
Director of Public Works, South Gate

Vincent Biondo
General Counsel
San Diego County Water Authority, San Diego

Robert K. Booth
City Attorney, Los Altos
Atkinson & Farsyn, Mountain View

Ariel Pierre Calonne
City Attorney, Palo Alto

William Carnazzo
Assistant City Attorney, Sacramento

Susan Case
Assistant City Attorney, Palo Alto

Michael Colantuono
City Attorney, Cudahy and La Habra Heights
Richards, Watson & Gershon, Los Angeles

Mike Coleman
Consultant, Davis

Jonathan Cristy
Kronick, Moskovitz, Tiedemann & Girard,
Sacramento

Thomas R. Curry
City Attorney, Livermore

J. Richard Doyle
City Attorney, Concord

Stephen Eckis
City Attorney, Poway
McDougal, Love, Eckis & Grindle, El Cajon

Wynne S. Furth
City Attorney, Claremont
Best, Best & Krieger, Ontario

Joan Gallo
City Attorney, San Jose

Daniel S. Hentschke
City Attorney, Oceanside and Solana Beach
Brown, Diven & Hentschke, San Diego

David Hirsch
City Attorney, Lompoc

Lois Jeffrey
City Attorney, Laguna Hills and Tustin
Woodruff, Spradlin & Smart, Orange

Sarah Knecht
Hatch & Parent, Santa Barbara

Roger Krauel
City Attorney, Coronado, Del Mar and Encinitas
Krauel & Krauel, San Diego

Joel D. Kuperberg
City Attorney, Irvine and La Palma
Rutan & Tucker, Costa Mesa

Bobbie Larsen
California Association of Sanitation Agencies,
Sacramento

Robert Leland
Director of Finance, Fairfield

Martha Lofgren
City Attorney, Folsom

Thomas Mauk
City Manager, Whittier

Steven Mayer
Howard, Rice, Nemerovski, Canady, Robertson, Falk
& Rabkin, San Francisco

Timothy McOsker
City Attorney, Downey
Burke, Williams & Sorensen, Los Angeles

Janet Morningstar
McCormick, Kidman & Behrens, Costa Mesa

Gordon Phillips
Assistant City Attorney, Alameda

Bob Reeb
Legislative Advocate
Association of California Water Agencies,
Sacramento

Ruth Sorensen
Executive Director/Litigation Coordinator
County Counsels Association of California
California State Association of Counties, Sacramento

William Statler
Director of Finance, San Luis Obispo

Barbara Steckel
Finance Director, Riverside

Mark Steres
Brown, Winfield & Canzoneri, Los Angeles

Betsy Strauss
City Attorney, Fairfield

Patricia Tubert
Assistant City Attorney, Los Angeles

Ron Tuller
Assistant City Attorney, Los Angeles

Dan Wall
California State Association of Counties, Sacramento

Natalie West
City Attorney, Brentwood
McDonough, Holland & Allen, Oakland

Laurence S. Wiener
City Attorney, Westlake Village
Richards Watson & Gershon, Los Angeles

Stan Wolcott
Rutan & Tucker, Costa Mesa

Tom Wood
Burke, Williams & Sorensen, Costa Mesa

I. Taxes

Introduction and Overview

What Is A Tax?

A tax is a monetary imposition of a governmental legislative body on persons or property subject to the jurisdiction of the governmental body, for the purpose of raising revenue to support its activities. *People v. McCreery*, 34 Cal. 432 (1868). Because Proposition 218 affects taxes, as well as certain kinds of assessments, fees and charges, it is important to understand the distinctions among these kinds of revenue devices.

A tax is equal in its burdens and uniform in its operation. *San Francisco-Oakland T. Rys. v. Johnson*, 210 Cal. 138, 291 P. 197 (1930). It may be levied on either property or persons, although California Constitution article XIII A, section 4 prohibits local governments from enacting special taxes which are *ad valorem* or transaction or sales taxes on real property.

In contrast to a tax, the nature of an assessment requires that it be levied in proportion to the specific benefit to real property derived from the proceeds of the assessment. *See County of Fresno v. Malmstrom*, 94 Cal. App. 3d 974, 156 Cal. Rptr. 777 (1979). An assessment is levied typically on real property; the amount of the assessment may vary among assesseees, depending upon the relative benefit of the assessed properties. *See City Council v. South*, 146 Cal. App. 3d 320, 194 Cal. Rptr. 110 (1983).

A tax is also distinguished from a fee or charge, which is a monetary imposition for the use of a commodity or service, or, with respect to development fees, to pay for facilities to offset the added burden to the government attributable to the development. Otherwise valid fees or charges may be considered taxes to the extent that they exceed the reasonable cost of the service, commodity, or facilities for which they were imposed. *City of Dublin v. County of Alameda*, 14 Cal. App. 4th 264, 17 Cal. Rptr. 2d 845 (1993).

Key Changes Proposition 218 Makes to Tax Law

Proposition 218 affects tax levies in these principle ways.

- **Charter Cities.** Charter cities must subject the imposition, extension or increase of *general taxes* to the voters for approval.

- **Window Period Taxes.** Local agencies which imposed, extended or increased *general taxes* without voter approval after January 1, 1995 but before November 6, 1996 must submit them for voter-approval by November 6, 1998.
- **Election Timing.** *General tax* elections must be consolidated with a regularly scheduled general election for the members of the governing body proposing the tax, except in cases of an emergency declared by unanimous vote of the governing body.
- **Definitions.** Proposition 218 adds definitions of the terms “*general taxes*” and “*special taxes*” to the state constitution.

Proposition 218 makes these changes to the law by adding article XIIC to the California Constitution. This section of this guide examines the substantive and procedural effects of these changes, Proposition 218’s relationship to Proposition 62, and its effects on particular types of taxes.

Proposition 218’s Substantive Effects on Taxes

Under Proposition 218, what is the distinction between a “general” and a “special” tax?

Proposition 218 defines a “general tax” as any tax imposed for general government purposes. See Cal. Const. art. XIIC, § 1(a). Proposition 218 defines “special tax” as any tax imposed for specific purposes including taxes imposed for specific purposes and placed into a general fund. See Cal. Const. art. XIIC, § 1(d).

Practice Tip: Even though Proposition 218 defines the terms “assessments” and “fees and charges,” it does not define the word “tax.” Compare Cal. Const. art. XIIC, § 1, with Cal. Const. art. XIID, § 2. Therefore, look to previously existing law to determine the difference between a tax and a fee or assessment.

Practice Tip: The proponents of Proposition 218 have stated that the definition of “special tax” was meant to codify the holding in Rider v. County of San Diego, 1 Cal. 4th 1, 2 Cal. Rptr. 2d 490 (1991) (finding the key is the purpose of the funding, not the name of the bank account). Some attorneys worry this definition may be interpreted to include new taxes which would be placed in the general fund, but are promised for a specific purpose during the election process (for example, law enforcement, fire, parks, etc.). Public agencies and their officials may need to use additional caution in how they describe the need for a new or increased general tax so as not to inadvertently convert it into a special tax.

What effect does Proposition 218 have on existing taxes?

Proposition 218 requires that any general tax imposed, extended or increased between January 1, 1995 and November 6, 1996 without voter approval must be submitted to the voters within two years, in order to continue imposing the general tax. Cal. Const. art. XIII C, § 2(c). The election for these “window period” taxes is subject to all the restrictions described above relating to general taxes. Cal. Const. art. XIII C, § 2(c).

Practice Tip: Proposition 218 says this election must be held “within two years of the effective date of this Article;” the effective date is November 6, 1996. *See* Cal. Const. art. XIII C, § 2(c); Cal. Const. art. XVIII, § 4. As a practical matter, this appears to mean that the election must occur by the general election on November 3, 1998. *See* Cal. Elect. Code § 324(a)(1).

Practice Tip: The language of Proposition 218 is unclear whether only that portion of a tax which is increased or extended must be submitted to the voters or the entire tax including the increase or extension. A reasonable interpretation would limit the election only to the increase or extension, but a future court may determine otherwise.

It should be noted that at least one city has chosen to avoid the issue by enacting increases or expansions to the scope of existing taxes in the form of new taxes rather than as amendments to existing taxes. It may be an attractive consideration where a public agency cannot afford to risk its existing tax base and is, therefore, willing to undergo the resulting administrative burdens.

Some attorneys believe Proposition 218’s window period provisions may be subject to challenge on a theory similar to the one on which Proposition 62’s window period provisions were successfully challenged. *See City of Westminster v. County of Orange*, 204 Cal. App. 3d 623, 251 Cal. Rptr. 511 (1988), *rev. denied* (1988); *Santa Clara County Transportation Authority v. Guardino*, 11 Cal. 4th 220, 45 Cal. Rptr. 2d 207 (1995), *as modified on denial of rehearing* (1995) (distinguishing *Westminster* from *Woodlake* on that ground). Others believe this argument is weakened by the court’s holding in *Rossi v. Brown* (see discussion on page 7).

What effect does Proposition 218 have on charter cities?

Proposition 218, which amends the California Constitution, applies to counties, cities, cities and counties, including charter cities or counties, any special district, or other local or regional governmental entity. Cal. Const. art. XIII C, § 1(b). There is little disagreement among attorneys that Proposition 218 does, in fact, apply to charter cities. *Cf. Fielder v. City of Los Angeles*, 14 Cal. App. 4th 137, 17 Cal. Rptr. 2d. 630 (1993), *rev. denied* (1993); *Fisher v. County of Alameda*, 20 Cal. App. 4th 120, 24 Cal. Rptr. 384 (1993), *rev. denied* (1994) (holding Proposition 62, as a statutory initiative, *see* Cal. Gov’t Code §§ 57320-57330, does not apply to charter cities).

Proposition 218's "window period" provisions suggest charter cities must follow the same rules with respect to imposing, extending or increasing a general tax after January 1, 1995. Cal. Const. art. XIII C, § 2(c). Thus, if a charter city imposed, extended or increased a general tax after January 1, 1995, that tax is subject to Proposition 218's requirements that the action be submitted to the voters on or before the general election in 1998.

What effect do Proposition 218's tax provisions have on special districts, schools and redevelopment agencies?

Special districts are a kind of "local government" subject to Proposition 218's tax provisions. See Cal. Const. art. XIII C, § 1(b). School districts and redevelopment agencies are special districts within the meaning of Proposition 218. See Cal. Const. art. XIII C, § 1(c).

Proposition 218 says that "special purpose districts or agencies, including school districts, shall have no power to levy general taxes." See Cal. Const. art. XIII C, § 2(a). "Special *purpose* districts *or agencies*" are not a defined term in Proposition 218. Cf. Cal. Const. art. XIII C, § 1(c) ("'Special district' means an agency of the state, formed pursuant to general law or a special act, for the local performance of governmental or proprietary functions with limited geographic boundaries including, but not limited to, school districts and redevelopment agencies."). There is room to argue that Proposition 218 has not conclusively resolved the controversy over whether multipurpose special districts (such as community services districts), have the authority to levy general taxes.

Does Proposition 218 confer new taxing authority on districts which have authority to levy fees and assessments to fund services, but no general taxing authority?

No. Proposition 218 specifically says that it does not provide any new authority to any agency to impose a tax, assessment, fee or charge. Cal. Const. art. XIII D, § 1(a). Thus, while Proposition 218 limits authority to impose fees, charges or assessments for general governmental services (including but not limited to police, fire, ambulance or library services), it also appears to preclude limited purpose districts from raising revenues for those purposes except by means of a special tax. Districts which rely on assessments and fees under Proposition 218 may need to seek taxing authority from the Legislature in order to obtain approval from their voters to continue funding the services the districts provide.

Procedural Requirements for New or Increased Taxes

What effect does Proposition 218 have on the procedures for enacting general taxes?

Under Proposition 218, no local government may impose, extend, or increase any general tax until such tax is submitted to the electorate and approved. Cal. Const. art. XIII C, § 2(b). The imposition, extension or increase of general taxes requires a *majority vote* of the electorate voting in an election on the tax. Cal. Const. art. XIII C, § 2(b).

The election to approve a general tax must be consolidated with a regularly scheduled general election for members of the governing body of the local government except in cases of emergency declared by a unanimous vote of the governing body. Cal. Const. art. XIIC, § 2 (b).

See California Government Code sections 53720 *et seq.* (Proposition 62) for other requirements to enact general taxes. Note that California Government Code section 54954.6 (Ralph M. Brown Act) has notice and hearing requirements for new or increased general taxes; however these provisions do *not* apply to voter-approved general taxes. See Cal. Gov't Code § 54956(e).

What effect does Proposition 218 have on the procedures for enacting special taxes?

Under Proposition 218, no local government may impose, extend, or increase any special tax until such tax is submitted to the electorate and approved. Cal. Const. art. XIIC, § 2(b). The imposition, extension or increase of special taxes requires a *two-thirds vote* of the electorate voting in an election on the tax. Cal. Const. art. XIIC, § 2(d).

Unlike Proposition 218's requirements for general taxes, there are no timing restrictions on elections to approve special taxes. Similarly, Proposition 62's timing provisions for special taxes are not restrictive. See Cal. Gov't Code § 53724 (c) and (d) (requiring consolidation with a statewide primary election, a statewide general election, or a regularly scheduled local election at which all of the electors of the jurisdiction are entitled to vote *or* any other date permitted by law, with the local jurisdiction bearing the costs of the election).

See California Government Code sections 53720 *et seq.* (Proposition 62) for other requirements to enact special taxes. Note too that Proposition 218 does not affect specific statutory requirements for special tax elections, for example, provisions for elections in community facilities (Mello-Roos) districts. See *generally* Cal. Gov't Code §§ 53311 *et seq.*

What constitutes "increasing" a tax such that it will be subject to Proposition 218's voter-approval requirements?

A general or special tax has not been "increased" and is not subject to an election if it is imposed at a rate no higher than the maximum rate previously approved. Cal. Const. art. XIIC, § 2 (b) and (d). However there is some ambiguity as to what this means in the context of pre-Proposition 218 taxes that have automatic escalators and other similar provisions.

Practice Tip: Public agencies may wish to evaluate including escalators and maximum rate provisions in tax ordinances presented for voter approval. This approach may obviate the need to go back to the voters as long as the public agency keeps its tax rates below voter-approved maximum rates.

Proposition 218's Relationship to Proposition 62 and *Guardino*

What effect does Proposition 218 generally have on Proposition 62?

The California Supreme Court in *Santa Clara County Transportation Authority v. Guardino*, 11 Cal. 4th 220, 45 Cal. Rptr. 2d 207 (1995), *as modified on denial of rehearing* (1995), upheld Proposition 62's requirements for general and special taxes. Although its application to charter cities is unclear, Proposition 62 clearly applies to general law cities. Thus at a minimum, general law cities must follow the provisions of *both* Proposition 62 and 218 in enacting taxes.

What effect does Proposition 218 have on unresolved issues relating to Proposition 62?

The *Guardino* case specifically upheld the validity of Proposition 62 and "disapproved" the holding in *City of Woodlake v. Logan*, 230 Cal. App. 3d 1058, 282 Cal. Rptr. 27 (1991). In *Woodlake*, a court of appeal found Proposition 62's statutory provisions requiring voter-approval unconstitutional. Many public agencies had relied on *Woodlake* and other appellate court decisions to their detriment.

However, *Guardino* did not address the issue of whether its decision applied retroactively to taxes imposed between the dates of November 5, 1986 (the effective date of Proposition 62) and the date of the *Guardino* decision (final decision effective December 11, 1995). Therefore, taxes enacted or increased between those dates (especially by general law cities and counties) without the correct amount of voter approval were at some risk.

Proposition 218 purports to apply retroactively back to January 1, 1995. *See* Cal. Const. art. XIII C, § 2(c). Some attorneys believe a credible argument can be made that the voters' enactment of a January 1, 1995 window period date resolves the retroactivity issue for *Guardino* and Proposition 218 can be interpreted to impliedly "grandfather" all taxes adopted without voter approval prior to January 1, 1995.

If nothing else, Proposition 218's window period provisions would appear to provide a "ripeness" defense to public agencies who are defending Proposition 62 lawsuits attacking taxes imposed within that "window" period.

If Proposition 218 does resolve the *Guardino* retroactivity issue for taxes imposed after January 1, 1995, it may impliedly authorize public agencies to keep collecting those taxes until they can be validated at the polls by November 6, 1998.

As noted earlier, some attorneys believe Proposition 218's window period provisions may themselves be subject to challenge on a theory similar to the one on which Proposition 62's window period provisions were successfully challenged. See *City of Westminster v. County of Orange*, 204 Cal. App. 3d 623, 251 Cal. Rptr. 511 (1988), *rev. denied* (1988); *Santa Clara County Transportation Authority v. Guardino*, 11 Cal. 4th 220, 45 Cal. Rptr. 2d 207 (1995), *as modified on denial of rehearing* (1995) (distinguishing *Westminster* from *Woodlake* on that ground). Others believe that the rationale on which the *Westminster* case was decided was weakened by the California Supreme Court in *Rossi v. Brown*, 9 Cal. 4th 688, 693, 38 Cal. Rptr. 2d 363 (1995) (holding that limits on the referendum power do not extend to the use of the initiative power to repeal taxes prospectively).

The general defenses for lawsuits challenging taxes adopted without complying with Proposition 62 still exist. The cities of La Habra and Pinole have been successful at the trial court level in arguing that a three-year statute of limitations applies to actions challenging taxes as having been enacted without the requisite voter-approval. The general issue of the retroactivity of the *Guardino* decision is pending at the court of appeal level in a case called *Turner v. County of Butte*, No. 3CIVC021574 (3d Dist. Court of Appeal).

Effect of Proposition 218 on Particular Types of Taxes

Does Proposition 218 apply to business license taxes, utility users taxes and other local general taxes?

Yes. Proposition 218 applies to all local taxes. Public agencies should review each tax to determine the extent to which it is exempt from Proposition 218's provisions as a pre-1995 tax and the procedures which would apply in the event the agency wishes to propose an increase.

What effect does Proposition 218 have on public agencies' authority to levy parcel taxes?

Parcel taxes take many forms. They may be a special tax, see *Heckendorn v. City of San Marino*, 42 Cal. 3d 481, 229 Cal. Rptr. 324 (1986), or a general tax in the form of excise tax. See *Neecke v. Mill Valley*, 39 Cal. App. 4th 946, 46 Cal. Rptr. 2d 266 (1995), *rev. denied* (1996). School districts levy property taxes under Government Code section 50079 that are generally referred to as parcel taxes.

A parcel tax is usually an annual tax which is based on either a flat per-parcel rate or a rate which varies depending upon the use, size and/or number of units on each parcel. Parcel taxes based upon the value of the property are invalid as a violation of Proposition 13's limits on *ad valorem* property taxes. See Cal. Const. art. XIII A, § 1. See generally *City of Oakland v. Digre*, 205 Cal. App. 3d 99, 252 Cal. Rptr. 99 (1988).

Article XIID, section 3 provides that no general taxes “shall be assessed by any agency *upon any parcel of property or* upon any person as an incident of property ownership.” (emphasis added). A number of attorneys believe that Proposition 218 broad prohibition of general taxes on parcels of property has limited parcel taxes in such a way as to require two-thirds vote of approval. From a practical standpoint, it will be very difficult to draft a parcel tax ordinance which will survive challenge.

What special issues does Proposition 218 create for utility users taxes?

In the face of changing technology in the telecommunications industry and deregulation in the areas of electricity and natural gas, many public agencies are considering amendments to their utility users taxes which would expand the types of utilities upon which the tax could be collected. Such amendments would likely be considered a new or extended tax, to which Proposition 218 would apply.

Some attorneys are developing ordinances, which include, among other provisions, the ability to expand the scope of a tax so long as the estimated total revenues to be derived from the expanded tax do not exceed the total revenues derived from the tax in a certain base year (as set by the ordinance), indexed annually for inflation.

II. Assessments

Introduction and Overview

What is an Assessment?

A special assessment is a charge generally levied upon parcels of real property to pay for benefits the parcels receive from local improvements. Special assessments are levied according to statutory authority granted by the Legislature or, in some instances, local charters.

Key Changes Proposition 218 Makes to Assessment Law

Proposition 218 affects special assessments in three principal ways.

- **Repeal By Initiative.** It subjects assessments to repeal or reduction by initiative.
- **Procedural Requirements.** It establishes procedural and other requirements for the levy of assessments, including a requirement for property owner approval by a new mail ballot process.
- **Burden of Proof.** It alters the burden of proof in legal actions to contest the validity of an assessment.

Proposition 218 makes these changes by adding article XIIIID to the California Constitution.

Proposition 218 does not provide any new authority to local agencies to impose assessments. Thus, until statutory changes are made to harmonize existing assessment procedures with the requirements of the proposition, local agencies must substantially comply with both existing statutes and the new constitutional requirements.

Further, charter cities, in the adoption of local procedural ordinances relating to assessments, must now comply with the requirements of *both* Proposition 218 and article 16, section 19 of the California Constitution. This latter provision of the constitution requires assessment ordinances in charter cities to contain procedural requirements substantially similar to certain provisions of the Special Assessment Investigation, Limitation and Majority Protest Act of 1931.

The following sections discuss Proposition 218's effects on the procedures for new assessments (including changes to majority protest procedures), what may be included in an assessment, assessment of public property, burden of proof, exemptions, standby charges, drainage, sewer or bridge and thoroughfare fees and the use of initiatives to repeal or reduce assessments.

Procedures For New Assessments

General Procedures

What are the procedures and requirements for assessments established by Proposition 218?

The procedures and requirements for assessments established by Proposition 218 are contained in article XIID, section 4. They are summarized in the following outline.

- A. Identify all parcels which will have a special benefit conferred upon them, including property owned by federal, state or local governmental agencies.
 - (1) "Special benefit" means a "particular and distinct benefit over and above general benefits conferred on real property located in the district or to the public at large."
 - (2) General enhancement of property value is *not* a "special benefit." Key word is "general." Special and particular enhancement is a traditional measure of special benefit and rebuts a potential "taking" challenge.
- B. Determine the "proportionate special benefit" to each property in relationship to the entirety of cost of acquiring or constructing an improvement or of "maintaining and operating" such an improvement. The assessment on a parcel may not exceed the reasonable cost of the "proportional special benefit" conferred on such parcel. Apportioning special benefit does not require mathematical precision. So long as the apportionment is reasonable and is justified by the engineer's report, it should be upheld. (See discussion of burden of proof in following sections of this guide)
- C. Only "special benefits" are assessable. Under prior law, only properties *receiving* special benefit were assessable but the fact that some incidental general benefit also resulted from capital improvement or maintenance did not invalidate an assessment apportioning some or all of that general benefit to specially benefited properties within the district. Under article XIID, costs associated with general benefit must be paid from other resources of the local agency.

D. Notice requirements.

- (1) Requires 45 day mailed notice to record owner of each parcel. Eliminates published notice option established in the Brown Act for assessment districts which are coterminous with local government boundaries or for assessment districts of 50,000 parcels or more. Who is the record owner? There are at least two possibilities: the owner as shown on the latest equalized assessment roll (preexisting law) and the owner of record as shown by the County recorder.
- (2) Notice of hearings required by the statutory provisions under which the agency is levying the assessment must also be followed. In some instances this will require combined notices and multiple public hearings. The vote under Proposition 218 would occur at the last required public hearing.
- (3) Contents of notice.
 - (a) total assessment for entire assessment district;
 - (b) assessment chargeable on owner's parcel;
 - (c) duration of proposed assessment;
 - (d) reason for assessment;
 - (e) basis on which amount of proposed assessment was calculated;
 - (f) date, time and place of public hearing;
 - (h) summary of voting procedures and effect of majority protest.

E. Protest by ballot.

- (1) Property owners may now express their support or opposition to proposed assessment by ballot which must accompany the notice.
- (2) Ballots must be returned before the conclusion of the public hearing.
- (3) Ballots tabulated at the public hearing.
- (4) No assessment may be imposed if a "majority protest" exists. Overturns ability of legislative body in some assessment district proceedings to override a majority protest by a 4/5ths vote.
- (5) "Majority protest" exists if ballots submitted in opposition exceed ballots submitted in favor of assessment.

- (a) Vote is weighted according to proportional financial obligation of affected property.
- (b) Modifies preexisting law which generally required owners of 50 percent or more of property proposed to be assessed (determined by acreage) to file a written protest in order to establish a majority protest.

When do the new procedures go into effect?

Proposition 218 is not entirely clear on this point. In general, the provisions of article XIID became effective on November 6, 1996. However, section 5 of article XIID says all existing, new or increased assessments (with certain “grandfathering” exemptions discussed below) must comply with its provisions beginning July 1, 1997. Cal. Const. art. XIID, § 5. It also says certain assessments existing on November 6, 1996 are exempt from the new procedures and approval process. Cal. Const. art. XIID, § 5.

Some legal counsel are of the opinion that until July 1, 1997, existing procedures for levying assessments are unaffected by Proposition 218 and that *new* assessments may be levied without compliance with the provisions of article XIID, section 4.

A modified version of this view is that the substantive requirements of section 4, subsections (a) and (b) do apply, but that the notice, hearing and approval process of section 4, subsections (c), (d) and (e) do not apply. Counsel taking either of these views are also recommending that proceedings be completed by May 31, 1997 in order to allow the thirty day statute of limitations for most assessment proceedings to run before July 1, 1997.

The alternate view is that article XIID, section 5 does not create a window period during which the procedures of Proposition 218 are not applicable to assessment proceedings. Counsel taking this view construe the provisions of section 5 as creating a limited exemption applicable only to assessments “existing” on November 6, 1996. Counsel with this view are recommending public agencies comply with *both* existing assessment law (the underlying principal acts) and the provisions of Proposition 218. The challenge is to craft, to the extent possible, procedures which harmonize the provisions of both the principal act and Proposition 218.

New Majority Protest Procedures For Assessments

What is the basic change made by Proposition 218 to majority protest procedures?

Article XIID, section 4 (c), (d) and (e) create a new requirement for a special mailed ballot procedure to determine a majority protest. Legislation would be helpful to implement these provisions of Proposition 218. In particular the legislation must address the procedures applicable to the completion, return and tabulation of the ballots. Amendments to the various

existing majority protest procedures contained in existing principal assessment acts will be required to harmonize the new notice, hearing and protest requirements of article XIID with existing notice, hearing, and protest procedures.

Further, legislation will be helpful to address issues such as modifications to the improvements, district boundaries or assessments in response to testimony at the protest hearing. Government Code section 54954.6 should also either be repealed or amended to conform to the new requirements of article XIID. Under a number of principal acts relating to formation of financing districts (including assessment districts and Mello-Roos Community Facilities Districts¹) there are separate provisions for a protest hearing *before* conducting an election to approve the assessment or special tax.

Because Proposition 218 combines the protest hearing with the mailed ballot process, it is somewhat difficult to look to existing statutes to determine how to conduct the new protest procedures for assessments. However, because general law cities and others must comply with all procedural requirements for the formation of assessment districts and the levy of assessments, compliance with both existing protest statutes and the majority protest provisions of article XIID is required until legislative changes are made. There may also be some room for local public agencies, under their police powers, to adopt implementing procedures so long as these procedures do not conflict with Proposition 218, state law or other provisions of the state the constitution. *See* Cal. Const. art. XI, § 5.

Under existing law, charter cities may establish their own assessment procedures. Nothing in Proposition 218 would preclude a charter city from adopting procedures to implement its protest provisions.

Under existing protest procedures, property owners generally have the right to protest the proposed improvements, the extent of the district, and the amount of the proposed assessment. Do they still have that right under article XIID?

The protest procedures of article XIID appear to apply only to the protest against the "assessment." Unless the Legislature eliminates existing protest rights, it would appear that property owners would continue to have the right to protest the proposed improvements or the extent of the district. Only the proposed assessment is subject to the special protest by mail ballot provisions.

¹ Mello-Roos community facilities districts are *not* subject to Article XIID. The Mello-Roos procedures are mentioned merely because of the election requirement. Mello-Roos special taxes may be subject to article XIIC, section 3's initiative provisions.

Does article XIID affect the ability of the legislative body to make changes in the improvements, the extent of the district, or the amount of assessments once the notice of the hearing and the ballots are mailed?

It appears that existing procedures for making changes in assessment districts (for example Streets and Highways Code sections 10350 - 10358) would not be affected by article XIID, section 4(c), (d) and (e). As noted above, however, legislation would be helpful on this issue.

How does the agency identify the property owner for the purposes of sending notice and a ballot?

Article XIID, section 4(c) says the notice and ballot must be sent to "the record owner of each parcel." This provision could be construed to require a search of the records of the county recorder to determine the identity of the owner. Must the agency establish a method for notifying owners acquiring title after the making of the last equalized assessment roll? Legislation would be helpful to allow an agency to conclusively rely on the assessment roll.

Must a public agency determine whether tenants are directly liable to pay the assessment and therefore must be allowed to vote?

Article XIID, section 2(g) defines "property ownership" to include "tenancies of real property" when the tenant is "directly liable" to pay an assessment. Controversy exists over the meaning of the term "directly liable." Some are of the view that it applies only to taxes, assessments, fees or charges which are imposed directly on a tenant. The ballot pamphlet is not helpful on this issue, inasmuch as it simply says "renters responsible for paying assessments" would vote. However, the new majority protest procedures in article XIID do not create a right for tenants to vote on assessments.

Article XIID, section 4(c) requires that the "record owner of each parcel" get notice of the assessment and a ballot. Article XIID, section 4(g) states in part:

Because only special benefits are assessable, electors residing within the district who do not own property within the district shall not be deemed under this Constitution to have been deprived of the right to vote for any assessment.

Unless the Legislature specifies to the contrary, it would appear that the right to receive notice and to vote on an assessment is limited to the record landowner. This appears to be consistent with existing law. See *Southern California Rapid Transit District v. Bolen*, 1 Cal. 4th 654, 3 Cal. Rptr. 843 (1992), *rehearing denied* (1992). However, some believe that Proposition 218's allocation of the protest voting power violates equal protection, particularly when it can be shown that assessments are the direct personal obligation of persons other than the landowner. Judicial challenges to the constitutionality of Proposition 218 on this ground may be filed.

Proposition 218 seems to have anticipated litigation on the “who-gets-to-vote” issues. It says that if a person brings a successful suit with respect to a specific assessment proceeding on the ground that the provisions of article XIID preclude participation by tenants in violation of federal constitutional or statutory law, then public agencies must obtain approval of the assessment by *both* property owners and a two-thirds vote of the electorate in the district. Cal. Const. art. XIID, § 4(g).

Is there any requirement as to what type of mail must be used?

No. Current statutes relating to mailing of notices in assessment districts generally require mailing, postage prepaid, by United States first class mail. A record of mailing by the clerk is generally sufficient evidence of the fact of mailing. Legislation to address this issue would be helpful.

Is the public agency required to provide a return envelope for the ballots?

No. Proposition 218 merely requires that the notice include instructions for the completion and return of the ballot. The ballot must include the agency's address for receipt of the ballot once completed by the landowner. Legislation to address this issue would be helpful.

Are the ballots public records?

Under existing law, records of majority protests are public records. Elections Code provisions relating to conduct of registered voter, mail ballot elections have detailed procedures to assure the confidentiality of the ballot until after the polls are closed and the ballots are ready to be counted. Under Proposition 218, the new assessment protest procedure occurs in the context of a “majority protest” hearing, suggesting an open public process. Legislation to address this issue would be helpful.

May the ballot be returned by someone other than the property owner?

Again, this is an issue that requires a legislative response. If existing mail ballot procedures of the Elections Code were imported to serve as the new assessment protest procedures under Proposition 218, then the ballots will be required to be returned either by mail, or by personal delivery from the voter or a statutorily designated person. *See, e.g.,* Cal. Elect. Code §§ 3017, 4100 *et seq.* The key issue is protecting the integrity of the protest.

May property owners submit ballots at the public hearing?

Proposition 218 does not specify the procedures for returning ballots. Under current assessment law, protests may be submitted or withdrawn during the public hearing. There is nothing in section 4 of article XIID which prohibits the Legislature from establishing a similar procedure for the conduct of the assessment protests under its provisions.

Because Proposition 218 combines the protest hearing with the tabulation of ballots, one can argue Proposition 218 contemplates a procedure permitting return of the ballots up until the time of the close of the public input portion of the hearing. One can also argue a property owner may change his or her vote during the public input portion of the public hearing up until the time at which the public agency announces that ballots may no longer be submitted.

Issues such as these should be addressed in the summary of the procedures for the completion, return and tabulation of the ballots. The agency is required to include such a summary in the notice under article XIIIID, section 4(c).

Can a public hearing be continued to permit tabulation of the ballots?

Probably yes. There is nothing in Proposition 218 prohibiting an agency from closing the public input portion of the public hearing and then continuing the hearing to permit the tabulation of ballots.

Proposition 218 specifically states that the ballots must be tabulated "at the public hearing." Whether this provision permits tabulation by public count without the presence of the legislative body remains to be determined. However, it would appear that the legislative body could delegate the responsibility for tabulating the ballots to an official such as the city or county clerk with the announcement of the results of that tabulation at a later date. This is commonly done under current assessment procedures for the tabulation of a majority protest.

Practice Tip: Public agencies may want to consider procedures that will allow them to presort and to weigh the proportionate voting right of each ballot received so that the ballots can be quickly tabulated (by hand or by computer) at the time of the hearing. Arguably, nothing in Proposition 218 prohibits a preliminary tabulation of ballots in advance of the public hearing, so long as the final, "official" tabulation occurs at a public hearing.

If the owner of the property is a public agency partnership, corporation, joint tenancy, tenancy in common, who gets to vote?

The agency should specify the answer to this question in the procedures it establishes for the return of the ballot. It would appear that the vote could be cast by any of the general partners, joint tenants or tenants in common. Corporations and public agencies would need to authorize a person to cast the vote and return the ballot. An assessing agency should establish procedures for authenticating the ballot and determine whether "split" voting will be accepted. See, e.g. Cal. Water Code § 35003.1 (allowing split voting in cases of multiple ownership in water district landowner elections).

May an agency skip the majority protest ballot process under article XIID and go straight to an election?

Probably not. Article XIID creates a mandatory process for the approval of assessments. *See, e.g.,* Cal. Const. art. XIID, § 4(e) (requiring the public agency to conduct a public hearing and consider all protests). The process does not include a procedure to bypass Proposition 218's new majority protest procedures. (Preexisting assessment statutes permit votes as a method for obtaining approval of certain matters in assessment proceedings. *See e.g.,* Cal. Sts. & Hwys. Code §§ 10120 (water and sewer improvements in 1913 Act districts), 22525.5 (certain public facilities in Landscaping and Lighting Districts), 54703 *et seq.* (assessments under Benefit Assessment Act of 1982). However, there is no general authority for establishing assessments by election.).

Does the new weighted vote process violate constitutional principles of one-person/one-vote or equal protection?

This issue will undoubtedly be litigated. The test is likely to be whether apportioning the votes in an assessment district financing based upon the relative financial burden to the property subject to the assessment has a rational basis. *See Southern California Rapid Transit District v. Bolen*, 1 Cal. 4th 654, 677, 3 Cal. Rptr. 2d 843 (1992), *rehearing denied* (1992); *County of Riverside v. Whitlock*, 22 Cal. App. 3d 863, 876, 99 Cal. Rptr. 710 (1972). In *Southern California Rapid Transit District v. Bolen*, an assessment vote was challenged on the ground that the failure to apportion voting power according to financial burden lacked a rational basis. The California Supreme Court rejected this argument. *See Bolen*, 1 Cal. 4th at 677-681. However, as noted above, some experts take the position that the allocation of the voting power to landowners only violates equal protection, particularly when the obligation to pay an assessment is directly placed on a person other than the landowner.

What May Be Included in Assessments

Does article XIID contain new authority for the levy of assessments for operations and services?

Not until there is implementing legislation. Except in a few instances (for example, fire suppression assessments, *see* Cal. Gov't Code § 50078, assessments under the Landscaping and Lighting Act of 1972, *see* Cal. Sts. & Hwys. Code § 22525, and under county service area law, *see* Cal. Gov't Code § 25250.1), existing statutes generally do not authorize levy of assessments for operations or services. Article XIID, section 1(a) specifically states that it does not create any new authority for an agency to levy an assessment.

Thus, the new law operates as a limitation on the otherwise broad authority of the Legislature (or the legislative body of a charter city, county or city and county) to authorize assessments. Any assessment for operations or services must be based upon statutory authorization or local ordinance adopted by a charter city pursuant to its charter authority.

Does article XIID limit the scope of assessments for maintenance and operations expenses?

Maybe. The definition of "maintenance and operations" contained in article XIID, section 2(f), appears to limit assessments for such purposes to the maintenance and operations of "permanent public improvements." However, article XIID, section 4(a) authorizes assessments for "capital costs", "maintenance and operation expenses" and "the cost of the property related service being provided." The cost of maintaining and operating certain types of improvements which are not "permanent" and providing services may be justified as an assessment for the cost of a "property related service." Legislative clarification of this matter may be appropriate.

Does article XIID limit the ability to assess for incidental expenses under current statutory authority?

No. Article XIID, section 4(a) appears to permit assessments for the "entirety" of the capital cost or maintenance and operation of a public improvement or of a property related service. Existing statutory definitions of "incidental expenses" (for example, Streets and Highways Code sections 5024, 10005.5, and 22526) relate to costs reasonably necessary for the planning and design of the public facilities, the formation of the district (which would now include the costs of balloting), the levy and collection of assessments, and the issuance of bonds. These would all appear to be within the scope of the "entirety" of costs which may be apportioned according to special benefit.

Assessment Of Public Property

Must the property owned by another public agency be assessed?

Probably yes, unless there is evidence that the publicly-owned parcels receive no special benefit. Article XIID, section 4(a), states that public agencies "shall not be exempt from assessment. . . ." It is unclear whether this provision creates a mandatory requirement to assess public agencies unless there is clear evidence that their property will not receive a special benefit from a particular improvement or property related service, or whether it merely forbids the assessing agency from passing the portion of the assessable costs attributable to the public property on to the owner landowners.

Also unclear is Proposition 218's reference to parcels "owned *or used*" by public agencies not being exempt from assessment. *See* Cal. Const. art. XIID, § 4(a) (emphasis added).

What is clear, however, is that the judicially-created implied exemption of public agencies from assessments is reversed. Legislation will be helpful to implement this provision.

Practice Tip: When public property is specially benefited, the assessing agency may desire to make a contribution to the improvement cost. Under existing law (for example, the 1911 and 1913 Acts) assessment of publicly-owned property is permitted. However, the major concern has not been the authority to assess, but rather the ability to collect the assessment from the public agencies.

Prior to Proposition 13, assessed agencies could levy a special tax to pay the involuntary obligation represented by an assessment. Passage of Proposition 13 made the levy of special taxes problematic because of the requirement for a two-thirds vote. Without the authority to assure an adequate method of collection, the agency could not market and sell bonds secured by assessments against publicly-owned property.

Proposition 218 does not solve the problem of the two-thirds vote requirement for the levy of a special tax to pay assessments. Assessments against the state present a different problem. There is a substantial delay of several years before the money is paid from the state to an assessing agency. In the interim, the assessing agency is required to advance funds. Legislation would be helpful to establish effective methods of collecting assessments against publicly-owned property.

Do Proposition 218's assessment provisions include all public agencies?

Yes, as a practical matter. The property is to be assessed if it is owned or used by an agency, the State of California, or the United States of America. "Agency" is defined by reference to article XIII C, section 1(b), and includes any county, city, city and county, including a charter city or county, any special district, or any other local or regional governmental entity. Schools and redevelopment agencies are special districts within the meaning of Proposition 218. See Cal. Const. art. XIII C, § 1(c).

Presumably, the "State of California" and the "United States" includes all departments and agencies of those entities.

Does this overturn prior law to the effect that public property is not subject to assessment?

Not really. Although Proposition 218 reverses the judicially-created implied exemption of public agencies from assessments, it does not appear to alter the Legislature's authority to establish requirements for assessments of publicly-owned property. Publicly-owned property has always been liable for special assessments when there is positive legislative authority to levy the particular assessment against public property. Some statutes currently authorize assessment of public property. See, e.g., Cal. Sts. & Hwys. Code §§ 5301 - 5303, 5320 - 5320, 10206 (1911 and 1913 Acts).

The 1972 Lighting and Landscaping Act authorizes assessment of property owned by a public agency but requires the assessing agency to pay the assessment, unless the assessed agency voluntarily pays the assessment amount. Cal. Sts. & Hwys. Code § 22663. Until the Legislature adopts implementing legislation, it is unclear what the rules will be for assessing government property.

Is the federal government exempt under federal law?

In effect, yes. Because of the supremacy clause of the United States Constitution and the Act for the Admission of California into the Union, the federal government may ignore an assessment levied without authorization by an act of Congress. See *Palm Springs Spa, Inc. v. County of Riverside*, 18 Cal. App. 3d 372, 376 - 377, 95 Cal. Rptr. 879 (1971).

Who pays if the federal government is assessed?

If the federal government is not liable for the assessment and there is no state statutory authority directing otherwise, no one is required to pay the assessment of the federal property. But, of course, the agency will have to make up the shortfall in the project budget.

One important instance where there is statutory authority directing otherwise is assessment proceedings taken under the Municipal Improvement Act of 1913. If the property of the United States of America or any department thereof is assessed, the agency levying the assessment must pay the assessment out of its general fund. Cal. Sts. & Hwys. Code §§ 5303 and 10206.

Is the State of California exempt?

No. As noted, prior to Proposition 218's passage, there was an implication that state property was exempt absent specific authorization; now that implication is no longer valid.

What about other types of charges for capital improvements? Are governmental entities now liable for payment of those charges?

In *San Marcos Water District v. San Marcos Unified School District*, 42 Cal. 3d 154, 228 Cal. Rptr. 47 (1986), *reh'g denied* (1986), the California Supreme Court confirmed a series of court of appeal decisions concluding that a local public agency cannot collect a fee designed to defray the costs of future capital improvements from public agencies absent specific statutory authority. The court stated that such charges were in the nature of special assessments regardless of whether the charge was assessed to all property owners in the district or was levied only on users.

The test formulated by the court for determining whether a charge is actually an assessment is whether the "purpose" of the fee is to defray the cost of capital improvements. If so, the fee will be deemed a special assessment regardless of the form of the fee for purposes of determining whether a public agency is exempt. After the *San Marcos* decision, the Legislature adopted Government Code sections 54999 through 54999.6. It appears that Proposition 218 does not affect the statutory provisions.

Who pays if the state is assessed?

It depends on the enabling statute. For example, under the Municipal Improvement Act of 1913, the state or any department thereof may be liable for the assessment, but only after the Legislature has appropriated the amount necessary to make payment. Prior to the appropriation, the levying agency must advance the amount of the assessment. Cal. Sts. & Hwys. Code §§ 5320 - 5325, 10206.

What if a local public agency chooses not to pay?

Generally, public property used for public purposes may not be foreclosed for non-payment of an assessment. Instead, a mandamus action may be filed against an agency that chooses not to pay. A mandamus action is an action seeking an order of the court directing the agency to take a statutorily required action such as paying an assessment. Cal. Sts. & Hwys. Code. §§ 5302.5, 10206.

Can a local public agency levy a tax to pay the assessment or satisfy a writ of mandate?

The local public agency may levy a tax if authorized by legislation. However, in *City of San Marcos v. Board of Supervisors*, 159 Cal. App. 3d 355, 205 Cal. Rptr. 566 (1984), the court held that the levy of an additional ad valorem tax pursuant to Streets and Highways Code section 5302.5 to pay a special assessment was a tax which would exceed the one percent limit of article XIII A, section 1 and a special tax which could not be imposed without a two-thirds vote under article XIII A, section 4. One of the reasons why governmental entities were no longer included in assessment districts after Proposition 13 was the difficulty in enforcing the assessment obligation and the corresponding impact of the marketability of bonds secured by such assessments.

Can an assessing agency pay the assessment attributable to a public agency which is benefited by the improvements instead of levying an assessment?

Yes. The improvements or property related services the capital cost or maintenance and operation expenses of which are paid through special assessments are public improvements or services of the assessing agency. Thus, payment of those costs by an assessing agency would not constitute gifts of public funds, even if the payment relieves another agency of that expense. Under existing law, assessing agencies may make contributions to an assessment district and in

some instances must make such contributions on behalf of other public agencies included in an assessment district. *See, e.g.,* Cal. Sts. & Hwys. Code §§ 5303, 10205, 22663.

What if the public property does not receive a special benefit?

The property would not be subject to assessment.

What must public agencies show if the property is excluded because there is no special benefit?

The agency conducting the assessment proceedings must conclude "by clear and convincing evidence" that there is, in fact, no special benefit to the parcel.

What is "clear and convincing evidence"?

"Clear and convincing evidence" refers to a higher than usual standard of evidence sufficient to establish a fact. The phrase has been defined by courts in various ways, including evidence that is "clear, explicit and unequivocal," evidence "so clear as to leave no substantial doubt," and evidence "sufficiently strong to command the unhesitating assent of every reasonable mind." 1 Witkin, *California Evidence*, § 160, p. 137 (3d ed. 1986). If no evidence is presented or more than one conclusion may reasonably be drawn from the evidence presented, the evidence is not clear and convincing.

When and where must the clear and convincing evidence be shown?

In the engineer's report. Challenges to assessments are generally based on the record of proceedings taken before the legislative body that levies the assessment. Thus, the agency conducting the assessment proceedings must make sure that "clear and convincing evidence" has been presented to it and included in the record of the proceedings.

Does the public agency being assessed participate in the ballot process for determining the existence of a "majority protest"?

Yes. There is no basis for excluding assessed public agencies.

Who submits a ballot on behalf of a public agency?

Generally only the legislative body of a public agency may authorize an act on behalf of the agency. The matter should be presented to the legislative body and the legislative body should make its determination and direct an appropriate official to act in accordance with the determination.

What if an un-assessed public agency property is located within the boundaries of an existing assessment district?

If the existing assessment district is exempt from the operation of Proposition 218 by virtue of article XIID, section 5, the fact that un-assessed public agency property is within the boundaries of the district should not require any action so long as the assessment is not increased. If the existing assessment district is not exempt, then the special benefit, or lack thereof, to the public property would need to be addressed in the engineer's report in the same manner as for the initial formation of a district.

Increases of assessments in preexisting exempt districts containing public property pose a particularly difficult problem. A strict interpretation of subsections (a), (b) and (d) of article XIID, section 5 could lead to a conclusion that only the increased portion of the assessment is subject to being re-spread to include public property. However, with respect particularly to maintenance assessments which are subject to an annual levy, it would appear that increasing the assessment could trigger a requirement to re-spread the entire assessment.

Burden Of Proof

What is the effect of article XIID, section 3(f) on the burden of proof in legal actions challenging the validity of an assessment?

Article XIID, section 3 (f) eliminates the near conclusive presumption in favor of the agency's determinations established by the California Supreme Court in *Dawson v. Town of Los Altos Hills*, 16 Cal. 3d 676, 129 Cal. Rptr. 97 (1976), and reconfirmed in *Knox v. City of Orland*, 4 Cal. 4th 132, 14 Cal. Rptr. 2d 159 (1992).

Under the new law, the agency will be required to show, based upon the record created before the legislative body, that a valid method was used to identify the special benefit to be received from an improvement, that all parcels receiving a special benefit have been identified and included within the district, that the cost of the improvement has been reasonably apportioned among the benefited parcels according to special benefits, and that costs attributable to general benefits to the public at large are not paid from special assessments.

Preparation and reliance upon the detailed engineer's report called for by article XIID, section 4 (a) and (b), along with the record of the proceedings of the legislative body, should satisfy this burden in most instances.

Practice Tip: The California Municipal Law Handbook (in the practice tip following section VI.A.c.(2)(h)), notes a three-part test for analyzing the validity of any benefit district or assessment spread:

1. Identify the benefit to be received from the public improvement
2. Determine if the benefit received is a specific and direct benefit to the property in the district.
3. Determine if the spread formula is based upon the individual benefits received.

This test is not substantially different from the requirements of Proposition 218. A key to a successful engineer's report is to assure that the engineer explains not only what he or she did, but also why it was done. Further, if there is general benefit, an agency contribution should be required.

Dawson stated the former standard for judicial review of assessments as follows:

A special assessment finally confirmed by a local legislative body in accordance with applicable law will not be set aside by the courts unless it clearly appears on the face of the record before that body, or from facts which may be judicially noticed, that the assessment as finally confirmed is not proportional to the benefits to be bestowed to the properties to be assessed or that no benefits will accrue to such properties.

Dawson, 16 Cal. 3d at 685.

This test, which established a strong presumption in favor of the agency action in the absence of fraud or capricious action, was reconfirmed by the California Supreme Court in *Knox* against a suggestion by the challengers that the court should reject the *Dawson* standard of review in light of a less deferential standard articulated in *Beaumont Investors v. Beaumont-Cherry Valley Water District*, 165 Cal. App. 3d 227, 211 Cal. Rptr. 567 (1985), *rev. denied* (1985), for reviewing fees which were challenged as illegal special taxes.

Because the proponents of Proposition 218 have indicated that the provisions of article XIIIID, section 4(f) are consistent with existing law as stated by *Beaumont Investors*, it is helpful to review that case and the cases subsequent to it in order to determine the nature of the new burden of proof for assessments under article XIIIID.² See HJTA Annotated Version of Proposition 218, at 9.

² Article XIIIID, section 6 also places the burden on local agencies of proving compliance with the provisions of the Proposition 218 relating to fees and charges.

In *Beaumont Investors*, the court of appeal was faced with a challenge to a water service fee on the ground that it constituted a "special tax." The "sole issue" in that case was "whether the record demonstrates that the facilities fee sought to be imposed by defendant does or does not 'exceed the reasonable cost' of constructing the water system improvements contemplated by the District," and thus fit within the statutory exclusion from the definition of special taxes found in Government Code section 50076. *Id.* at 234. Because the district was claiming an exemption from the general restriction established by article XIII B and implementing legislation on the authority of a local agency to impose special taxes, the court determined "it rightfully follows that the local agency which seeks to avoid the general rule should have the burden of establishing that it fits the exception."

After holding that the agency had the burden of establishing the validity of the fee, the *Beaumont* court compared the scant record of the agency's actions in setting the fees with the detailed record which was prepared by the city in establishing its facilities benefit assessments which were sustained by a different division of the same appellate court in *J.W. Jones Companies v. City of San Diego*, 157 Cal. App. 3d 745, 203 Cal. Rptr. 580 (1984). The court emphasized the district's failure to produce any evidence from the record of the agency hearings supporting the fee calculation and concluded that the district failed to meet its burden.

Cases decided after *Beaumont* demonstrate the reliance the court places on the legislative record created by the agency. For example, in *Russ Bldg. Partnership v. City and County of San Francisco*, 199 Cal. App. 3d 1496, 246 Cal. Rptr. 21 (1987), *aff'd in part and rev'd in part*, 44 Cal. 3d 839, 244 Cal. Rptr. 682 (1988), the court relied on numerous studies and the record of public hearings at which the legislative body discussed and ultimately adopted a transit development charge to distinguish *Beaumont* case and to find "whether we term the transit fee a special assessment or a development fee, as applied in this context, the charge levied is directly related and limited to the cost of increased municipal transportation services engendered by the particular development." *Id.* at 1506.

Later, in *Bixel Associates v. City of Los Angeles*, 216 Cal. App. 3d 1208, 265 Cal. Rptr. 347 (1989) *rev. denied* (1990), the court of appeal compared the imprecise basis the city used for determining a fire hydrant fee on new development with the detailed methodology used for establishing the transit fee challenged in *Russ Bldg. Partnership*, and the facilities benefit assessment challenged in *J.W. Jones Companies v. City of San Diego*. The *Bixel* court noted for both the transit fee and the facilities benefit assessment, "the public agencies met their burden of showing that a valid method had been used for arriving at the fee in question, one which established a reasonable relationship between the fee charged and the burden posed by the development." *Bixel*, 216 Cal. App. 3d at 1219.

Shapell Industries, Inc. v. Governing Board of Milpitas Unified School Dist., 1 Cal. App. 4th 218, 1 Cal. Rptr. 818 (1991), *rev. denied* (1992), addressed the question of whether the standard of judicial review applying the *Beaumont* case was the "substantial evidence test" or some other test. Deciding the question in the context of a school impact fee challenged on the ground that it was an illegal special tax, the court reaffirmed that the legislative body must show, through the record created before the legislative body, that a valid method was used for arriving at the fee in question, one which established a reasonable relationship between the improvement and the benefit. The court's review is limited to the record before the legislative body and the test is whether the agency's action is "arbitrary, capricious or entirely lacking in evidentiary support."

According to the court in *Shapell Industries*, the determination whether an agency's action is "arbitrary, capricious or entirely lacking in evidentiary support," is not the same as the substantial evidence test. "We cannot agree that local legislation, particularly that which results in the imposition of substantial fees on property owners as a condition of improving their property, should be virtually immune from effective judicial review. If courts shun evidentiary review as beyond their province, the reasonableness of the agency's action is relegated to the agencies themselves, whose primary interest is in financing their own projects. On the other hand, we do not advocate an approach which renders the two standards interchangeable, since there are sound policy reasons for the courts to exercise considerable deference to agencies acting under legislative mandate." *Shapell Industries*, 1 Cal. App. 4th at 232. *See also Garrick Development Co. v. Hayward Unified School District*, 3 Cal. App. 4th 320, 328, 3 Cal. Rptr. 897 (1992), *rev. denied* (1992).

The Court in *Shapell Industries* stated the following test: "For our purposes we find useful the test articulated by our Supreme Court in *California Hotel & Motel Assn. v. Industrial Welfare Comm.*, 25 Cal. 3d 200: "A court will uphold the agency action unless the action is arbitrary, capricious, or lacking in evidentiary support. A court must ensure that an agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute." *Id.*

Article XIID does not change the legislative character of special assessments. Thus, it follows that the burden placed on the agency to support its determination in assessment proceedings is one that must be met, and challenged, at the legislative hearing process. In *Western States Petroleum Assn. v. Superior Court*, 9 Cal. 4th 559, 576 (1995), the California Supreme Court has reiterated that quasi-legislative administrative decisions are subject to a more deferential degree of judicial review. Judicial review must be made based upon the evidence established during the hearing of the legislative body and not extra-record evidence. Extra-record evidence is admissible only in rare circumstances where

- The evidence existed before the agency made its decision and
- It was not possible in the exercise of reasonable diligence to present the evidence to the agency before the decision was made so that it would be considered and included in the legislative record.

Id. at 578. The factual bases of quasi-legislative administrative decision are entitled to the same deference as the factual determinations of trial court, that the substantiality of the evidence supporting such administrative decisions is a question of law. The court must determine whether the agency's decision was supported by substantial evidence in the record but must not re-weigh the evidence. *Id.* at 574.

This conclusion is consistent with assessment district cases decided prior to the adoption of Proposition 13. *See, e.g., Jeffery v. City of Salinas*, 232 Cal. App. 2d 29, 37-38, 42 Cal. Rptr. 486 (1965). In *Jeffery*, the court applied the substantial evidence test and affirmed the trial court's judgment based on a city engineer's report and testimony, even in the face of contradictory evidence presented by plaintiffs. The court found the report and testimony constituted sufficient evidence to uphold the city's determination that plaintiffs' property would be specially benefited by parking improvements to be financed by an assessment district.

In *Jenner v. City Council of the City of Covina*, 164 Cal. App. 2d 490, 500, 331 P.2d 176 (1958), the court noted: "In the case at bar, the city council conducted hearings and heard testimony and then fixed the boundaries of the district and the apportionment of the assessment. To allow plaintiffs to introduce evidence in the trial court on this same question would clearly be within the prohibition of the *Fascination* [*Fascination, Inc. v. Hoover*, 39 Cal. 2d 260, 246 P.2d 656 (1952).] decision."

In the cases in which courts have ruled that no special benefit would inure to those assessed, the courts found the administrative records absolutely devoid of evidence in support of the proposed assessments. *See, e.g., Harrison v. Board of Supervisors*, 44 Cal. App. 3d 852, 118 Cal. Rptr. 828 (1975) (assessment of uphill residents for a drainage project rejected where the record before the board contained no evidence that relief of flooding and occasional traffic congestion several blocks away would benefit uphill property); *Safeway Stores, Inc. v. City of Burlingame*, 170 Cal. App. 2d 637, 339 P.2d 933 (1959) (record demonstrated that the property already had more than enough parking for the current or any other potential property use, that other potentially benefited properties were gerrymandered out because they had protested, and that the proposed parking district would be detrimental to Safeway by benefiting its excluded competitors); *Spring Street Co. v. City of Los Angeles*, 170 Cal. 24, 148 P. 217 (1915) (record demonstrated that "no effort at all was made by the council to assess in proportion to benefits.").

Finally, in *Knox v. City of Orland*, 4 Cal. 4th 132, 14 Cal. Rptr. 2d 159 (1992) the court which rejected application of *Beaumont Investors* in the context of assessments, relying instead on the traditional *Dawson* test, stated in footnote 26 at page 149, "Although the issue is not presently before us, we question whether a special assessment would be valid under *Dawson* if there exists evidence in the record which contradicts the local legislative body's benefit determination and indicated that such determination was arbitrary, capricious or entirely lacking in evidentiary support. [Citation omitted.]"

Under article XIID, persons challenging assessments will not be required to prove the lack of any foundation for the agency's determination. On the other hand the agency will be entitled to rely upon the record created during the required hearing process. Challengers will be required to present evidence contrary to the engineer's report during the hearing in order to permit the agency to make proper decisions based upon all of the evidence. The agency can meet its burden under article XIID, section 4 (f) by introducing a properly prepared engineer's report and the record of the assessment proceedings. Apportioning special benefit has never required mathematical precision. So long as the apportionment is reasonable and is justified by the engineer's report, it should be upheld.

Exemptions

When must assessments comply with the provisions of article XIID?

With the exception of certain assessments which were "existing" on November 6, 1996, *all* other *existing* and *all new* or *increased* assessments must comply with the provisions of article XIID beginning July 1, 1997. Cal. Const. art. XIID, § 5 ("the July 1997 Compliance Requirement").

Which assessments may be exempt from the procedures and approval process of section 4 of article XIID?

Assessments which were "existing" on November 6, 1996, the effective date of article XIID, and which fall within one of the four exceptions identified in section 5 of article XIID are exempt from the procedures and approval process in section 4.

The four "exceptions" delineated in section 5 are as follows.

- Any assessment imposed exclusively to finance the capital costs or maintenance and operation expenses for sidewalks, streets, sewers, water, flood control, drainage systems or vector control. Cal. Const. art. XIID, § 5(a).
- Any assessment imposed pursuant to a petition signed by the persons owning all of the parcels subject to the assessment at the time the assessment is initially imposed. Cal. Const. art. XIID, § 5(b).
- Any assessment the proceeds of which are exclusively used to repay bonded indebtedness of which the failure to pay would violate the Contract Impairment Clause of the Constitution of the United States of America. Cal. Const. art. XIID, § 5(c).
- Any assessment which previously received a majority vote approval from the voters voting in an election on the issue of the assessment. Cal. Const. art. XIID, § 5(d).

These exemptions apply only to assessments existing on the effective date of Proposition 218. Except for assessments levied to pay bonded debt, increases in any exempt assessment are subject to the procedures and approval process of article XIID, section 4.

Note too that the exemption is *only* from the procedures and approval process set forth in section 4, article XIID. *See* Cal. Const. art. XIID, § 5. Existing assessments must comply with Proposition 218's restriction that only special benefits may be assessed when evaluating street lighting and landscaping maintenance. *See* Cal. Const. art. XIID, § 2(b) and (i). To the extent an assessment provides both general benefits as well as benefits to specific parcels, a public agency may have to separate out the general benefits and pay for them out of another revenue source.

What is the status of existing assessment districts formed with a developer's consent through a development agreement?

Some attorneys believe a developer's consent to an assessment district through a development agreement satisfies Proposition 218's "petition exemption" for existing assessments. *See* Cal. Const. art. XIID, § 5(b). Legislation may be helpful to clarify this point.

What about assessments imposed annually?

Section 5 is silent as to whether an assessment existing on November 6 that is imposed on an annual basis, such as a maintenance assessment, continues to be an assessment existing on the effective date after it is re-imposed and thereby eligible to be exempt from the ratification requirement. A court giving Proposition 218 a liberal construction could conclude compliance with section 4's procedures and approval process is necessary when an assessment requires affirmative legislative action on an annual basis in order to continue to be imposed

Addressing this concern, an annotation to section 5 provided by the Howard Jarvis Taxpayers Association states:

An assessment is deemed "existing on the effective date of this Article," even if it is the type of assessment which comes up for annual renewal. As long as the assessment rates and methodology remained the same from year to year, the fact that the assessment is "imposed" annually would not necessarily trigger applicability of the requirements of this Article. This would be true even if the total revenue to the district increased due to changes in land use for specific parcels (e.g., newly-created or improved parcels). Again, as long as the assessment rates and methodology remain the same, an increase in revenue as a result of land use changes would not trigger applicability of Section 4. However, the procedures and approval process of Section 4 would apply to the entire assessment in the event the assessments were increased either by the rate of assessment or by a change in methodology.

This annotation, of course, has no legal authority. *See Amador Valley Joint Union High School District v. State Board of Equalization*, 22 Cal. 3d 208, 245, 149 Cal. Rptr. 239 (1978).

The position taken in the renewal portion of the annotation, however, appears to be consistent with current law.

Will an existing assessment for street lighting energy charges and maintenance be exempt from the July 1997 Compliance Requirements?

Probably. While street lights are not expressly listed among the improvements in section 5(a), a sound argument can be made that street lights are an integral part of "streets" and, therefore, an existing assessment for street lighting energy charges and maintenance should be exempt from the July 1997 Compliance Requirements as an assessment for the maintenance and operation of streets.

First, the definition of "maintenance and operation expenses" contained in article XIID, section 2(f) appears to be sufficiently expansive to include street lighting energy charges and maintenance. "Maintenance and operations expenses" is defined to mean "the cost of rent, *repair, replacement, rehabilitation*, fuel, power, *electrical current, care*, and supervision necessary to properly operate and maintain a permanent public improvement." (emphasis added) This definition clearly includes the types of maintenance and operations activities commonly associated with street light maintenance and operations.

Second, existing law supports the determination that street lighting is included as a part of "streets" as a "permanent public improvement" as contemplated in the above definition of "maintenance and operations expense." Streets and Highways Code section 29 defines "construction" to include:

- Any improvement excepting maintenance as defined in section 27.
- Such improvements, without being limited thereto, may include, where capital outlay is required, provision for special safety conveniences and devices, roadside planting and weed control, and such illumination of streets, . . . as in the judgment of the body authorized to expend funds is required for the safety of persons using the same."

Accordingly, it may be argued that since the Legislature has included "illumination of streets" as a part of the construction thereof, a street as a "permanent public improvement" includes street lights where the agency authorized to expend funds for such lighting determines that such lighting is required for safety of persons using the streets and a capital outlay is required for such lighting.

Third, existing law also supports an interpretation of the maintenance and operations of streets to include street lighting energy charges and maintenance. Streets and Highways Code section 27 defines "maintenance" when used in the general provisions of such code related to county and city highways to include any of the following:

- The preservation and keeping of rights-of-way, and each type of roadway, structure, safety convenience or device, planting, *illumination equipment*, and other facility, in the safe and usable condition to which it has been improved and constructed, but does not include reconstruction or other improvement.
- Operation of special safety conveniences and devices, *and illuminating equipment*.

The same analysis would seem to apply with equal or greater weight to traffic signals.

While a sound argument can be made to support the conclusion that an existing assessment for the maintenance and operations of street lights is exempt under section 5(a), it remains uncertain that a reviewing court would necessarily reach the same conclusion. Additionally, representatives of the Howard Jarvis Taxpayers Association have stated that they did not intend to exempt existing assessments for street lighting maintenance and operation from the July 1997 Compliance Requirement. While the intention of the Taxpayers Association would not be considered by any reviewing court in construing the meaning the section 5(a) exception, *see Amador Valley Joint Union High School District v. State Board of Equalization*, 22 Cal. 3d 208, 245, 149 Cal. Rptr. 239 (1978), the fact that the Taxpayers Association would oppose such an exception may be an indication of their willingness to judicially challenge such an interpretation of the section 5(a) exception.

Implementing legislation which would define street maintenance and operations to include street lighting energy charges and maintenance would enhance the likelihood of a favorable judicial interpretation of the section 5(a) exception.

Will an existing assessment for lighting energy charges and maintenance for street lights located in parks and public parking lots be exempt from the July 1997 Compliance Requirements?

Probably, if such lighting is intended to illuminate sidewalks. Probably not, for example, if such lighting is intended to exclusively illuminate play areas, ball fields or parking lots (unless, perhaps, the parking lot is a necessary part of a water, sewer or flood control facility). Because street lights are not listed in section 5(a) among the improvements for which existing assessments for maintenance and operations are exempt from the July 1997 Compliance Requirement, any exemption for street lighting maintenance and operations must rest upon the determination that street lighting is included in one of the listed improvements.

What types of existing assessments are exempt from the July 1997 Compliance Requirements under the impairment of contracts exception of section 5(c)?

The language of section 5(c) limits this exception to existing assessments the proceeds of which "are exclusively used to repay bonded indebtedness." This exception would clearly apply to assessments securing bonds issued under either the Improvement Act of 1911 or the Improvement Bond Act of 1915.

The Howard Jarvis Taxpayers Association has stated in an annotated version of Proposition 218 circulated prior to the election "in the hopes that the arguments being circulated by our opponents, which overstate the impact of the initiative, are adequately answered" that the section 5(c) exception can only be used for bonds "that are actually protected by the impairment clause" and that "Certificates of Participation and other creative debt instruments would not be protected."

The courts, as previously stated, will not take the intent of the Taxpayers Association into account in attempting to construe and interpret the provisions of Proposition 218 inasmuch as such intent was not manifest in the documents which the courts may consider in such an analysis (chiefly the ballot summary, arguments and analysis). See *Amador Valley Joint Union High School District v. State Board of Equalization*, 22 Cal. 3d 208, 245, 149 Cal. Rptr. 239 (1978).

While an agency's obligations represented by certificates of participation are not bonded indebtedness, they are obligations under contract. It should be noted that, if the agency validly contracted to levy assessments to support its contractual obligations, the United States Constitution's contract clause may protect certificates of participation despite the stated limitations in this provision of the California Constitution. Such assessments also may be exempt under one or more of the other provisions of section 5.

May an agency conduct an election between November 6, 1996 and July 1, 1997 to seek approval for the levy of an existing assessment in order to exempt such assessment under section 5(d) from the July 1997 Compliance Requirements?

With certain notable exceptions, for example, fire suppression benefit assessments levied pursuant to Government Code section 50078, certain assessments levied pursuant to the Benefit Assessment Act of 1982, Cal. Sts. & Hwys. Code §§ 54703 *et seq.*, community centers or auditoriums in a Landscaping and Lighting Act of 1972, Cal. Sts. & Hwys. Code § 22525.5, and water supply systems or sanitary sewers and facilities under the Municipal Improvement Act of 1913, Cal. Sts. & Hwys. Code §§ 10120 - 10125, there is no existing statutory authorization for voter consideration of the levy of assessments.

However, some attorneys believe the reference to voter "approval" in Proposition 218, *see* Cal. Const. art. XIID, § 5(d), suggests that both advisory votes and direct voter enactments may "grandfather" an existing assessment. Others believe the reference to the term "previously" in that section refers to elections held previous to November 6, 1996. Clarifying legislation establishing July 1, 1997 as the deadline for such voter approval would be helpful.

How does Proposition 218 affect business improvement districts?

Business improvement districts may be established either under the provisions of the Parking and Business Improvement Area Law of 1989, Cal. Sts. & Hwys. Code §§ 36500 *et seq.* (the "1989 Act") or the Property and Business Improvement District Law of 1994, Cal. Sts. & Hwys. Code §§ 36600 *et seq.* (the "1994 Act"). Both statutory schemes permit the levy of assessments for both "improvements" and "activities," including promotion of public events and tourism, furnishing of music in public places, and other expenditures beneficial to businesses in the district.

Assessments in 1989 Act districts are levied on "businesses," are apportioned according to estimated benefit to businesses and property in the district, and are frequently collected as a surcharge on a business license tax. Assessments in a 1994 Act district are levied on real property, are apportioned according to estimated benefit to real property within the district, and may be collected in the same manner as *ad valorem* taxes.

1994 Act Levies

Districts formed and assessments levied under the 1994 Act are subject to Proposition 218's substantive and procedural requirements, including the requirement that assessments may only be levied for special benefits conferred on real property. *See* Cal. Const. art. XIID, § 2(b). Proposition 218 defines "special benefits" as particular and distinct benefits over and above general benefits conferred on real property located in the district or provided to the public at large. *See* Cal. Const. art. XIID, § 2(i). General enhancement of property value does not constitute a special benefit. *See* Cal. Const. art. XIID, § 2(I).

1989 Act Levies

Districts formed and "assessments" levied under the 1989 Act may be subject to a different analysis.

Some attorneys believe assessments imposed under the 1989 Act on businesses are not assessments subject to Proposition 218. They base this conclusion on language in *Evans v. City of San Jose*, 3 Cal. App. 4th 728, 4 Cal. Rptr. 2d 601 (1992) *rev. denied* (1992). In that case, the court determined that 1989 Act assessments are "neither a true regulatory fee nor a true special assessment." *Id.* at 739. Unlike true special assessments, they are not a charge on real property and their purpose is not to pay for permanent public improvements benefiting the assessed real property. *Id.* at 737.

Article XIID defines "assessment" as meaning a levy or charge *upon real property* for special benefit conferred on the real property. *See* Cal. Const. art. XIID, § 2(b). Moreover, Proposition 218 says the procedural and substantive requirements of article XIID apply only to taxes, assessments, fees or charges assessed *as an incident of property ownership*. *See* Cal. Const. art. XIID, § 3. Because 1989 Act "assessments" are not assessed as an incident of property ownership but as an incident of doing business, 1989 Act charges may not be subject to the procedural and substantive requirements of article XIID.

Similarly, the procedures and requirements of article XIID relating to property-related fees and charges may not apply because under *Evans* the 1989 Act "assessments" are not charges on real property and are imposed solely as an incident to doing business.

Standby Charges

May the an agency continue to collect its existing standby charges without further action under Proposition 218?

Yes, all standby charges may be collected until July 1, 1997 and some standby charges are exempt from the July 1, 1997 ratification requirement.

Clause (4) of subsection (b) of section 6 of the article XIID states:

Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4 of this Article.

Classifying standby charges as assessments is consistent with current law. *See San Marcos Water District v. San Marcos Unified School District*, 42 Cal. 3d 154, 228 Cal. Rptr. 47 (1986), *rehearing denied* (1986); *Kern Co. Farm Bureau v. County of Kern*, 19 Cal. App. 4th 1416, 23 Cal. Rptr. 2d 910 (1993) *rev. denied* (1994).

Section 5 of article XIID establishes the effective date of article XIID and a compliance period for existing assessments. The second sentence of section 5 states:

Beginning July 1, 1997, all existing, new or increased assessments shall comply with this Article.

That sentence alone does not lead to the conclusion that an existing assessment/standby charge is subject to the procedures of section 4, because section 4 only addresses *proposed* assessments. However, the third sentence of section 5 reads:

Notwithstanding the foregoing, the following assessments existing on the effective date of this Article shall be exempt from the procedures and approval process set forth in Section 4: . . .

Although there is an inherent ambiguity to the second and third sentences of section 5, it appears that existing assessments (other than those exempted) must cease by July 1, 1997 unless ratified by the procedures prescribed in section 4.

What existing standby charges are exempt from Proposition 218's ratification procedures?

Under Proposition 218, exempted assessments include:

- Any assessment imposed exclusively to finance the capital costs or maintenance and operating expenses for sidewalks, streets, sewers, water, flood control, drainage systems or vector control,
- Assessments imposed pursuant to a petition signed by all parcel owners,
- Any assessment exclusively used to pay bonded indebtedness, and
- Assessments which previously received majority voter approval. Any increase to the exempted assessments (except for debt service) would be subject to the procedures prescribed by Section 4.

As noted above, section 6 of the proposed article XIID requires that standby charges be classified as assessments and "shall not be imposed without compliance with Section 4 of this Article." The additional phrase calling for compliance with section 4 presents another question of interpretation. If a standby charge is an assessment, then as a assessment, the standby charge is subject to sections 4 and 5 of article XIID and the additional phrase seems unnecessary.

Some believe that the phrase is simply surplusage inasmuch as there is no evidence of any intent to single out standby charges for more rigorous requirements. However, a court could find the section is not surplusage. In such a case, a court could conclude Proposition 218 compels all standby charges to be approved by or ratified by proceedings conducted pursuant to section 4, whether or not the assessment is otherwise exempted by section 5. (Note, however, the Howard Jarvis Taxpayers' Association's annotation under section 6(b)(4) indicates that standby charges can take advantage of assessment exemptions.)

Drainage, Sewer Or Bridge And Thoroughfare Fees Imposed Pursuant To The Subdivision Map Act

Are drainage or sewer facility fees imposed pursuant to Government Code section 66483 or bridge and thoroughfare fees imposed pursuant to Government Code section 66484 subject to article XIID?

No. Although the fees levied pursuant to sections 66483 and 66484 have attributes of assessments, these fees are more properly characterized as fees or charges imposed as conditions of property development. Article XIID, section 1 states in part: "Nothing in this article or Article XIIC shall be construed to: . . . (b) Affect existing laws relating to the imposition of fees or charges as a condition of property development."

Government Code section 66483 authorizes a city, county or city and county to adopt a local ordinance imposing a requirement for the payment of fees for planned drainage or sewer facilities as a condition of subdividing property. Section 66484 authorizes a city, county or city and county to adopt a local ordinance requiring "the payment of a fee as a condition of approval of a final map or as a condition of issuing a building permit" to pay for bridges and major thoroughfares.

Although the substantive requirements of both sections and the procedural requirements of Section 66484 are similar to those applicable to assessments, a fundamental difference remains in that the payment of the fee is voluntary in nature (as a condition of development) as opposed to involuntary as is true of special assessments.

Use Of Initiative To Reduce Or Repeal Assessments

The provisions of article XIIC, section 3 relating to initiatives to repeal, reduce or affect a local assessment are discussed elsewhere in this guide. See section IV of this guide.

Some believe there are arguments supporting the position assessments are beyond the reach of the voters, because the power to form assessment districts and to levy assessments has been vested solely in the legislative body of local governments. *See Committee of Seven Thousand v. Superior Court (City of Irvine)*, 45 Cal. 3d 491, 511-512, 247 Cal. Rptr. 362 (1988); *Dare v. Lakeport City Council*, 12 Cal. App. 3d 864, 869, 91 Cal. Rptr. 124 (1970). Additionally, due process principles would appear to preclude participation in an initiative respecting an assessment by persons other than owners of property specially benefited by the improvement financed or maintained through the assessment or who are directly obligated to pay.

However, article XIIC, section 3, specifically states that nothing in the state constitution, including the provisions relating to initiative, shall preclude the use of the initiative to reduce or repeal assessments. To the extent that assessments secure obligations incurred under a contract (including bonds), the United States Constitution's contract clause limits the ability of the people to legislate by initiative if the effect of an initiative would be to impair the contract.

Legislative clarification of these issues, including identification of the persons entitled to participate in an initiative regarding a special assessment, creation of a short period for filing an initiative to reduce an assessment, or delaying the effect of a reduction until after bonds are retired is essential.

In *Allis-Chalmers v. City of Oxnard*, 105 Cal. App. 3d 876, 883, 165 Cal. Rptr. 129 (1980), the court states:

It is a fact of common knowledge that the mere existence of a lawsuit usually prevents the sale of bonds and the raising of the funds required to do the work of improvement for which the special assessment has been levied. [Citation omitted.]

The same could be said about the cloud that would be created if special assessments are subject to repeal or reduction by initiative. In the *Allis-Chalmers* case, the court went on to note that the short statutes of limitation for challenges to special assessments are "essential to the consummation of the proceedings and to provide assurances to bond buyers that their investment will be reasonably safe and secure. *Id.*

Likewise, to the extent that the initiative is now available to repeal or reduce assessments, particularly those imposed to pay the principal and interest on bonds sold to finance public improvements, the Legislature must define the time within which assessments support bonds may be repealed or reduced through the initiative process.

This page was intentionally left blank.

III. Property-Related Fees And Charges

Introduction and Overview

What is a Property-Related Fee or Charge?

Generally speaking, a fee or charge is a monetary exaction to reflect a public agency's cost of providing a particular service to the public. Proposition 218 creates a special subset of fees and charges. It does so by using the term fee or charge to mean a "levy . . . imposed on a parcel or upon a person as an incident of property ownership . . . for a property-related service." *See* Cal. Const. art. XIID, § 2(e). Proposition 218 then creates certain procedural requirements relating to those fees and charges by adding article XIID, section 6 to the California Constitution.

Key Changes Proposition 218 Makes to Fee and Charge Law

In addition to creating this special subset of fees and charges, the chief changes Proposition 218 makes to the law in this area are:

- **Notice and Hearing Requirements.** Proposition 218 imposes extensive requirements for notifying property owners of new or increased property-related fees and a mechanism for rejecting such fees via a "majority protest" at a public hearing.
- **Voter-Approval.** Except for sewer, water and refuse collection services, fees which are imposed as an incident of property ownership for a property-related service require a majority vote of property owners or, at the public agency's option, a two-thirds vote of the general electorate.
- **Fees for General Governmental Services Prohibited.** Proposition 218 prohibits local agencies from using fees imposed as an incident of property ownership to fund general governmental services, including but not limited to fees for police, fire, ambulance or library services, which are available to the public at large in substantially the same manner as they are to property owners.

Proposition 218 also puts in the state constitution certain existing requirements that fees only pay for the services being provided and fee revenues not be used for purposes other than that for which the fee was imposed.

This section of the guide examines these requirements by analyzing *what kinds* of fees are subject to Proposition 218's procedural and substantive requirements, which is difficult to determine because of the confusing way in which Proposition 218 is written. The guide then discusses Proposition 218's substantive and procedural requirements, as well as timing issues.

Basic Analysis

What analytical steps should be followed in determining Proposition 218's effect on a given fee or charge?

The following process is helpful to structure one's analysis of Proposition 218's effect on fees and charges:

- Is the *kind* of fee or charge such that it is subject to Proposition 218's substantive and procedural requirements?
- If so, is the fee or charge structured in such a way as to satisfy Proposition 218's *substantive* requirements set forth in section 6(b)?
- Does the fee or charge need to go through the *notice and hearing process* set forth in article XIID, section 6(a)?
- Does the fee or charge require *voter approval* as required by article XIID, section 6(c)?

In addition, one should determine Proposition 218's effect on the substantive elements of existing fees and charges (see section entitled "timing issues" below).

Kinds of Fees and Charges Affected/ Fees and Charges Imposed as An Incident of Property Ownership

What kinds of public agency revenues are excluded from the general scope of the terms "fees" and "charges" in Proposition 218?

Proposition 218 specifically excludes two kinds of fees from its provisions:

- Developer fees ("Nothing in this article or Article XIIC shall be construed to . . . [a]ffect existing laws relating to the imposition of fees or charges as a condition of property development"), see Cal. Const. art. XIID, § 1(b) and

- Fees for the provision of electrical and gas service (these are excluded from the category of “charges or fees imposed as an incident of property ownership.” *See* Cal. Const. art. XIID, § 3(b).

In addition, Proposition 218 does not cover “regulatory fees” (for example, plan check and building inspection fees) and “facility user” fees (for example, park admission, boat launching and ambulance transport fees), since these have no relationship to property ownership.

What is the significance of the phrase “property related fees and charges”?

The phrase “property related fees and charges” appears in the title of article XIID, section 6, and in subsection (c) of that section (relating to voter approval). However, the phrase is not defined anywhere in Proposition 218. Article XIID, section 2(e) uses the phrase “fee . . . imposed . . . upon a parcel or upon a person as an incident of property ownership . . .” Section 2(e) then creates a subset of those fees which it labels “fees or charges for a property related service.”

What is the definition of “fee” or “charge” in Proposition 218?

Proposition 218 contains the following definitions.

- “‘Fee’ or ‘charge’ means any *levy* other than an ad valorem tax, a special tax or an assessment, imposed by an agency upon a parcel or upon a person *as an incident of property ownership*, including user fees or charges for a *property related service*.” Cal. Const. art. XIID, § 2(e) (emphasis added).
- “‘*Property ownership*’ shall be deemed to include tenancies of real property where tenants are directly liable to pay the assessment, fee or charge in question.” Cal. Const. art. XIID, § 2(g) (emphasis added).
- “‘*Property related service*’ means a public service having a direct relationship to property ownership.” Cal. Const. art. XIID, § 2(h) (emphasis added).
- “Reliance by an agency on any parcel map including, but not limited to, an assessor's parcel map, may be considered a significant factor in determining whether a fee or charge is imposed *as an incident of property ownership* for purposes of this article.” Cal. Const. art. XIID, § 6(b)(5) (emphasis added).

What then, are the essential elements of a “fee” or “charge” subject to Proposition 218?

- A “levy”
- “Imposed” by an “agency”

- On a “parcel” or
- On a “person as an incident of property ownership.”

What constitutes a “levy?”

The term “levy” when used in connection with authority to tax, denotes exercise of legislative function, whether state or local, determining that a tax shall be imposed and fixing amount, purpose and subject of the exaction. *Carkonen v. Williams*, 76 Wash. 2d 617, 458 P. 2d 280 (1969). See also Cal. Gov’t Code §§ 37100. The qualified electors “levy” a tax when they vote to impose it. *Howard Jarvis Taxpayers' Association v. Fresno Metropolitan Project Authority*, 40 Cal. App. 4th 1359, 48 Cal. Rptr. 2d 269 (1995), as modified on denial of rehearing (1996), rev. denied (1996). See also Cal. Gov’t Code §§ 53069.9, 66012, 66016; *North State Development Company v. Pittsburg Unified School District*, 220 Cal. App. 3d 1418, 270 Cal. Rptr. 166 (1st Dist. 1990).

Practice Tip: The term “levy” may be one of the keys to understanding the scope of Proposition 218. It suggests an involuntary payment to the government, as distinguished from a payment as part of a consensual commercial exchange (for example, fee for a public service provided upon request).

When is a levy “imposed?”

Although Proposition 218 uses the term “imposed” frequently, the term is never defined:

- “An agency shall follow the procedures pursuant to this section in *imposing* or increasing any fee or charge as defined pursuant to this Article . . .” Cal. Const. art. XIID, § 6(a) (emphasis added).
- “A fee or charge shall not be extended, *imposed* or increased by any agency unless it meets all of the following requirements: . . .” Cal. Const. art. XIID, § 6(b) (emphasis added).
- “Except for fees or charges for sewer, water, and refuse collection services, no property related fee or charge shall be *imposed* or increased unless and until such fee or charge is submitted and approved by a majority of the property owners subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electors residing in the affected area.” Cal. Const. art. XIID, § 6(c) (emphasis added).

Black’s Law Dictionary defines “impose” as “to levy or exact as by authority.” It appears reasonable to conclude that “imposed” means “established” or “enacted.”

A fee or charge is considered established or enacted when a public agency adopts the ordinance or resolution that creates the general obligation to pay the fee or charge. As a result, if an ordinance or resolution was adopted prior to the effective or triggering dates of Proposition 218, and contained increases scheduled to take effect at a future date, the fee or charge was imposed at the time of adoption, not at the time the increase takes effect. This conclusion is supported by language in article XIIC, section 2(b) pertaining to taxes.

Practice Tip: It might be advisable to consider the use of formulas rather than fixed amounts when dealing with future fee or charge increases.

What is an “agency?”

“Agency” is defined in Proposition 218 as “any local government as defined in article XIIC, § 1(b).” Cal. Const. art. XIIC, § 2(a). The term “local government” means

... any county, city, city and county, including a charter city or county, any special district, or any other local or regional governmental entity.

Cal. Const. art. XIIC, § 1(b).

Thus the term “agency” does not appear to include:

- Privately held companies, even those which may be regulated by the California Public Utilities Commission (for example, investor-owned utilities) or other public agencies.
- State government.

What does the phrase “on a parcel” encompass?

Proposition 218 contains no definition of the phrase “on a parcel.” Recall, however, that the drafters of Proposition 218 were focusing on a local agency practice which they viewed as an evasion of Proposition 13: labeling a revenue a “fee” or “charge” instead of a “tax” or “assessment.” Given this purpose, “on a parcel” may mean a fee or charge that, at its inception, constitutes an encumbrance or lien on a parcel (like an assessment).

How is a fee or charge levied as an encumbrance on a parcel at its inception?

When an assessment is imposed on a parcel, it is customarily secured by a lien on the property at the outset. If the owner of the parcel defaults on assessment payments, among the agency's remedies is foreclosure on the lien. The property owner can sell the parcel encumbered with the assessment and, if the seller is in default on assessment payments, the buyer takes the property subject to the lien.

This assessment-like revenue device is the type of fee or charge at which Proposition 218 is aimed. By contrast, utility rates and some other service fees are not initially a lien upon property. Only if the customer becomes delinquent may the public agency record a lien on the customer's property. Assuming that a fee is not subject to Proposition 218 in the first instance, the fee apparently could not become subject to Proposition 218 simply because a lien is placed on property due to delinquency in paying the fee.

What does the phrase “on a person as an incident of property ownership” mean? (Note that ownership includes tenancy where the tenant is obliged to pay the fee or charge.)

This issue is a source of considerable discussion among public agency attorneys because it is critical to understanding Proposition 218's application to fees and charges. Here are the two views:

- Some attorneys believe that the phrase “on a person as an incident of property ownership” means fees that a person must pay *solely* because that person owns property, and for no other reason. They believe fees or charges which are imposed as an incident of requesting or using a service such as sewer and trash collection, or purchasing a commodity such as water, are not subject to Proposition 218 because those fees or charges are not imposed on a person solely because that person owns property.
- Others believe Proposition 218 covers water and sewer charges (that is, customary rates for the use of water and sewer utility service), trash and other fees for services that are normally delivered to real property or a permanent location. These attorneys draw the line between these kinds of services and those that are personal in nature and whose delivery point is easily moveable.

A number of water and other public agency attorneys have analyzed the merits of the first position extensively and believe very strongly this is the only appropriate interpretation of Proposition 218. For ease of reference in the discussion that follows, they will be referred to as “Commodity Approach Proponents.” Dissenters from this position will be called “Delivery Approach Proponents.” This may be another area in which the Legislature can provide some clarification.

To assist public agency attorneys in applying Proposition 218 to various fees and charges, the arguments in support of each position are presented below.

How do Commodity Approach Proponents support their position?

They note that *Black's Law Dictionary* defines “incident,” when used as a noun, to mean:

... anything which inseparably belongs to, or is connected with, or inherent in, another thing . . . Also, less strictly, it denotes anything which is usually connected with another, or connected for some purpose, though not inseparably.

If interpreted strictly, the phrase “fee or charge . . . imposed . . . on a person as an incident of property ownership” would appear to mean fees that a person must pay solely because that person owns property, and for no other reason.

Commodity Approach Proponents argue this interpretation is consistent with the intent of the drafters of Proposition 218 who sought to stop local agencies from using fees to avoid rules regarding taxes and assessments. They believe the drafters sought to apply Proposition 218 to those fees which resemble taxes or assessments in the sense that the fees are levied against a property solely due to the fact that the person owns property:

. . . the focus of Proposition 218 is on those levies imposed simply by virtue of property ownership.

HJTA Annotated Text, page 4. They also point to the excerpts from the ballot arguments and campaign materials describing Proposition 218’s objectives.

Another relevant factor, in the Commodity Approach Proponents’ view, is Proposition 218’s procedures for the adoption of fees, which appear to contemplate that the fees will be charges solely by virtue of property ownership. For example, as part of the notice to property owners concerning the proposed adoption of a fee, Proposition 218 requires a local agency to calculate, for each parcel, the amount of the fee that the owner of that parcel must pay. Thus, they believe the initiative appears to assume that the amount of the fee or charge can be calculated prior to the imposition of the fee.

Commodity Approach Proponents note it is impossible to perform such a calculation where the property owner’s conduct determines whether the fee will be charged and how much the fee will be. For example, where the liability to pay a fee depends on the owner requesting service from the city, and where the amount of the fee depends on the quantity of service requested or used, it is not possible to determine in advance the fee that the owner of that property will pay.

Commodity Approach Proponents also point out Proposition 218’s references to user fees and its references to water, sewer and trash fees are not necessarily inconsistent with their view. The initiative contains no definition of “user fees.” Commodity Approach Proponents believe interpreting the term “user fees” as it appears in Proposition 218 as referring to all revenue devices which have traditionally been characterized as “user fees” extends Proposition 218’s reach beyond the legislative purpose articulated by its drafters.

Commodity Approach Proponents also believe the term “user fee” does not necessarily mean a fee that is triggered by a voluntary decision to use a service. The courts have construed the term “user fees” also to include fees imposed on a person because the person benefits from a government service which is provided without the property owner’s consent. *See, e.g., United States v. Sperry Corp.*, 493 U.S. 52, 110 S. Ct. 387, 107 L. Ed. 2d 290 (1989) (and cases cited

therein). They note the principle of statutory construction that the voters are presumed to understand the meaning of terms used in a ballot measure.

Water, sewer and trash fees are usually, but not necessarily, charged as an incident of choosing to use a service. Sometimes those fees are charged as an incident of property ownership (or a component of the fee is charged as an incident of property ownership). For example, a property owner may be required to pay refuse fees without regard to whether the owner uses the service. Similarly, some local agencies levy sewer fees on all property owners without regard to each property owner's discharge of waste water or consumption of water.

Commodity Approach Proponents explain the exemption for gas and electric fees from Proposition 218's property related fee requirements by pointing to the explanation of Proposition 218's sponsors. The sponsors explained the specific exemption for gas and electric service this way:

Such services, even when provided by a public entity, are usually metered and, therefore, probably meet the 'cost of service' requirements of this initiative. Therefore, they were exempted from application.

HJTA Annotated Text, page 6.

Finally, Commodity Approach Proponents note that the term "user fees" in Proposition 218 is modified by the phrase "for a property related service." The measure defines "fees for a property related service" as services that "have a direct relationship to property ownership." The use of this phrase, they believe, supports the conclusion Proposition 218's authors were focusing on fees for services which benefit property owners because of their status as owners, as distinguished from fees or charges for services which are delivered to a parcel and provide a benefit to the user of the service.

For these reasons, Commodity Approach Proponents have concluded that the initiative's references to "user fees" and its specific references to water, sewer and trash services can be harmonized with the interpretation of the term "incident of property ownership." That interpretation, as noted above, would apply Proposition 218 only to a fee or charge a person must pay simply because of property ownership, and not as a result of the request for service or use of the service by the property owner (for example, the consumption of water).

How do Delivery Approach Proponents support their position?

They point to language in Proposition 218. For example, they note the definition of fees and charges specifically includes "user fees or charges for a property related service" and article XIID, section 3 says that the only fees and charges that can be "assessed" on property or on a person as an incident of ownership of property are those for "property related services." Proposition 218 defines "property related service" as a public service having a direct relationship to property ownership. *See* Cal. Const. art. XIID, § 2(h).

Delivery Approach Proponents also note the California courts have interpreted “user fee” to generally mean a fee that is payment for a service received. It is “voluntary” in the sense that use of the service triggers the charge and is typically charged monthly to those who use the goods and services provided by the public agency. *San Marcos Water District v. San Marcos Unified School District*, 42 Cal. 3d 154, 228 Cal. Rptr. 47 (1986), *rehearing denied* (1986). There are those who believe that fees and charges to provide capital for the construction of water and sewer facilities will likely be defined by the courts to be “property related” irrespective of whether they are levied as a mandatory charge upon all parcels or as an incident to a request for service in light of the *San Marcos* case.

Delivery Approach Proponents also point to the provision in the initiative which expressly excludes fees for the provision of electrical and gas service from the definition of a “fee” imposed as an “incident of property ownership.” They argue that this explicit exemption for certain services implies that similar services, not so mentioned, are included in the definition.

Also relevant, according to Delivery Approach Proponents, is the specific exemption from the election requirement for water, sewer and refuse collection fees. They argue that, since the fees referenced above are specifically cited in the initiative and are usually charged as an incident of electing to use a service, and since the definition of “fee” includes user fees as a subset of fees imposed “as an incident of property ownership,” then the term “incident of property ownership” should be interpreted broadly to include fees that are charged as an incident of electing to utilize a property related service. They also argue that in a modern urban or suburban setting, availability of such services is often essential to any reasonable use of land.

Delivery Approach Proponents note that, in a jurisdiction where the regular service charge has two components, a service charge to pay for fixed costs (a flat rate based upon meter size) and a commodity charge to pay for the cost of discharge or consumption (which varies based upon use), a court could find that the service charge is levied on a person as an incident of ownership, even though it is levied only if a person chooses to connect to the system.

Finally, Delivery Approach Proponents believe that courts will, in conformance with the directive in section 5 of Proposition 218, construe Proposition 218’s provisions liberally to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent.

Applications/Analysis

Imposed On A Parcel Or On A Person As An Incident Of Property Ownership

What simple tests could be applied to determine whether a public agency fee/charge is imposed on a parcel or on a person as an incident of property ownership?

- **Statutory Test: Parcel Maps.** “Reliance by an agency on any parcel map, including, but not limited to, an assessor's parcel map, may be considered a significant factor in determining whether a fee or charge is imposed as an incident of property ownership for purposes of Article XIII D.” Cal. Const. art. XIII D, § 6(b)(5).
- **Property Ownership Test.** A fee or charge is subject to Proposition 218 if it must be paid by a person simply as a result of property ownership and for no other reason (for example, requesting service from the public agency).
- **No Opt-Out Test.** If a property owner cannot avoid payment of the fee or charge by declining the service for which the fee or charge is paid, the fee or charge is most likely subject to Proposition 218.
- **“On the Parcel” Test.** The fee or charge is subject to Proposition 218 if the fee or charge is a lien or charge on the parcel from the creation of the fee or charge, as distinguished from being a lien on the parcel only in the event of a default in payment.

How would these tests be applied to sewer charges, as an example?

Scenario. A sanitary district has adopted, by resolution, a set of rules and regulations which require that “users” of the sewer system pay for sewer service. The district collects user charges by calculating the amount of domestic water used on the property in previous year from water meter records, applying a rate which varies based on the nature of the use (for example, higher rate for restaurants and industrial users), and having the county tax collector include on the annual property tax bill an amount for sewer services. In the event of non-payment, amount owed is a lien on the property. Property on a septic system is exempt.

Analysis (Note that all arguments are not necessarily of the same strength/weight or equally supportable; moreover conclusions may vary according to whether one is a Commodity Approach Proponent or Delivery Approach Proponent.) :

The arguments *in favor* Proposition 218’s application are:

- The charge is only paid by people who own or lease property.
- The service is provided to real property and can only be used on property.
- The charge is collected with taxes.

The arguments *against* Proposition 218's application are:

- Liability for the charge results from hooking up to sewer system, not owning property.
- People on a septic system do not have to pay, and therefore property owners have a choice whether to pay the charge.
- Amount of charge relates to the type of use and demand on the system, not on property ownership.
- Imposition of the charge did not automatically create a lien.

Conclusion: Proposition 218 does not apply.

How would these tests be applied to fire flow charges, as an example?

Scenario: A water district is considering adopting a fire flow charge pursuant to Government Code section 53069.9. The charge is on "all land" within the district's boundaries and is for the purpose of installing, maintaining and operating fire protection water mains and hydrants, but not fire stations and engines. The charge is not imposed on residents as a consequence of ordering service from the district. The charge "may be" collected at the same time as "other water rates or water charges" by the district. The statute is unclear as to how the amount of the charge to be paid by each owner is determined.

Note: The language of Proposition 218 does not clearly state whether a fire flow water system (presumably including pipes and hydrants) is considered to be a general governmental service akin to maintenance and operation of a fire department or a police department. Some believe fire flow service is distinguishable from fire engines and police, because water mains and hydrants are fixed structures and cannot be diverted to use in other locations. If a fire flow water system is considered a general governmental service within the meaning of Proposition 218, then Proposition 218 would prohibit fees that fall within scope of the initiative. *See* Cal. Const. art. XIID, § 6(b)(5).

Analysis (Note that all arguments are not necessarily of the same strength/weight or equally supportable; moreover conclusions may vary according to whether one is a Commodity Approach Proponent or Delivery Approach Proponent.):

The arguments *in favor* Proposition 218's application are:

- The charge is only paid by people who own or lease property and there is no opportunity to avoid the charge by declining service.
- The service is provided to real property and can only be used on property.

The arguments *against* Proposition 218's application are:

- Charge is collected along with other water rates and water charges.³

Conclusion: Proposition 218 applies.

How would these tests be applied to trash franchisee, as an example?

Scenario. A solid waster hauling company is granted a franchise to collect and dispose of all residential and commercial trash within the city limits. The franchise is exclusive in that no other solid waste hauler can operate within the city limits. Residential users can elect to self-haul and avoid payment of the fee. The city charges the company a franchise fee for the benefit of the franchise. The city has set a maximum amount the company can charge residential and commercial customers for solid waste collection. The company charges each single family residential lot the same amount and charges each commercial account an amount which varies depending on the number and size of bins used on the account. The fee is collected by the company on an invoice mailed to the single family properties and other customers each month. In the event of non-payment, the company may discontinue service and sue the customer which could result in a judgment lien on the property.

Analysis (Note that all arguments are not necessarily of the same strength/weight or equally supportable; moreover conclusions may vary according to whether one is a Commodity Approach Proponent or Delivery Approach Proponent.):

The arguments *in favor* Proposition 218's application are:

- The fee is only paid by people who own or lease property.

³ This is an argument against Proposition 218's application by Commodity Approach Proponents.

- The service is provided to property and can only be used on the property.
- The trash company is providing a service which could be provided by the agent of the local agency.
- The local agency caps the maximum fee and receives a franchise fee.

The arguments *against* Proposition 218's application are:

- The fee is set and charged by a private company and not by an agency (Proposition 218 only applies to levies by agencies).
- The obligation to pay does not arise because the customer owns property; it arises because the property is used in a way which generates trash and the customer decides not to self-haul.
- Customers can opt-out of the service and avoid the fee.
- The fee is not an encumbrance on the property, although delinquent fees can become the subject of a judgment lien.

Conclusion: Proposition 218 does not apply.

Practice Tip: Where an agency grants a franchise for the refuse service and takes the position that the fee is not imposed by the agency, the franchise agreement should require indemnification and defense of the agency in the event a challenge is brought on the fee and the application of Proposition 218.

Practice Tip: A public agency, and its franchisee, may wish to structure the franchise to allow customers to "opt out" of the service. For example, a trash hauling charge can include a provision permitting a customer to self-haul and decline the service. An "opt-out" provision provides an argument to both the public agency and the company that the charge imposed on the customers is a "fee for service" which is consensual in nature, rather than a "levy," and therefore Proposition 218 does not apply. See also *City of Glendale v. Trondsen*, 48 Cal.2d 93, 808 P.2d 1 (1957) (finding a charge upon every occupied premise in city for rubbish collection services, whether or not in fact such services were used, was "valid either as a police power measure or as an excise tax . . .").

There may be bookkeeping and fiscal impacts that complicate the provision of such an exemption, however. Moreover, mandatory service has been adopted for important public policy reasons. The accumulation or improper disposal of solid waste presents real risks to public health. Therefore any proposal to weaken mandatory service requirements should also take into account these competing public policy issues.

Are there special issues with respect to Proposition 218's cost-of-service provisions and trash collection fees in light of statewide recycling mandates?

As a result of the enactment of the California Integrated Waste Management Act of 1989 (AB 939) the costs of recycling are now an integral part of refuse collection in California. The costs to agencies that do not recycle are higher through fees and penalties assessed or threatened to be assessed by the state. In addition, the cost for renting, leasing or transporting to landfills are high, as are taxes or charges imposed by agencies with landfills used by others.

Therefore, the costs of recycling which reduces overall refuse costs by reducing landfill use is arguably properly reflected in the overall refuse rate. This approach appears particularly applicable where the rates go up as the amount of garbage disposed of by a user increases. The inverted rate is in inverse proportion to participation in recycling. (The more garbage, the less recycling and the higher charge which is reflective of the cost of refuse service.) *See also Brydon v. East Bay Municipal Utility District*, 24 Cal. App. 4th 178, 29 Cal. Rptr. 128 (1994), *rev. denied* (1994).

Finally, a recycling charge is arguably an environmental mitigation charge, not a charge imposed as an incident of property ownership.

Does Proposition 218 govern fees or charges imposed on tenants?

Proposition 218 provides that "property ownership shall be deemed to include tenancies of real property where tenants are directly liable to pay the assessment, fee or charge in question." Cal. Const. art. XIII D, § 2(g).

Thus, fees or charges that are "imposed . . . as an incident of *property ownership*" (emphasis added) also appear to include fees and charges that are imposed as an incident of a tenancy of real property if the tenant is directly liable to pay the fee or charge in question.

By treating tenants who are directly liable to pay a fee or charge in the same manner as property owners, the authors of Proposition 218 apparently intend to prevent local governments from avoiding the restrictions on fees and assessments by imposing fees and assessments on those who hold a leasehold interest in property, rather than a fee interest.

Tenants apparently are “directly liable” to pay an assessment, fee or charge when the fee is imposed by the local government on the tenant and the local government holds the tenant, not the property owner, responsible for the fee or charge by, for example, directly billing the tenant for the fee or charge. This interpretation appears more consistent with the scheme for imposition of assessments, fees and charges and would appear to avoid absurd, unforeseen, and unintended procedural problems that would result from the alternative interpretation discussed below.

During the election campaign, some supporters of Proposition 218 indicated that if tenants are liable under a lease to pay an assessment, fee or charge, then the tenant is “directly liable” to pay the assessment, fee or charge. As a result, they argued, in that situation the tenant is treated as the property owner for the purposes of Proposition 218 and the tenant possess the right to protest, or vote on, any assessment, fee or charge.

There does not appear to be any support in the ballot pamphlet materials for the position that “directly liable” to pay the assessment, fee or charge means liable to pay the fee or charge under a lease. Furthermore, Proposition 218's scheme for imposing assessments, fees and charges does not appear to contemplate that tenants liable to pay an assessment, fee or charge pursuant to a lease will be treated as “property owners” or given a right to protest, or vote on, assessments, fees or charges. For example, there is no provision in Proposition 218 that explains how a local government is to determine whether a tenant is liable under a lease for payment. Nor is there any discussion about how to divide a vote if more than one tenant is liable under a lease for a fee or charge assessed to an individual parcel.

Practice Tip: Proposition 218 does not appear to create an obligation on the part of the agency to notify a tenant if the tenant is responsible under a lease or agreement for payment of taxes, assessment, fees and charges, but not responsible to the agency.

Agencies

Are the courts an “agency” under Proposition 218? Is a judgment lien approved by the court and recorded on the property a “charge” on a “parcel” subject to Proposition 218?

No. The apparent purposes of Proposition 218 would not be advanced by such an interpretation of the measure.

Are private companies which hold a franchise and levy charges on customers (for example, to pick up trash or recycling) an agency subject to Proposition 218?

A private company providing a utility service, such as a private water company, is not subject to Proposition 218. Some may suggest that private companies which hold a franchise are acting in lieu of, or as an agent for, the local government to provide a service and, therefore, should be subject to the terms of Proposition 218. However, since the term “agency” cannot reasonably be

interpreted to include a private company, and since the purpose of Proposition 218 is to place restraints on local governments, not private companies, Proposition 218 should not apply to private companies that hold a franchise to provide a service.

Some private companies, such as cable television companies, hold non-exclusive franchises. Since, in that situation, the customer's freedom of choice is greater (including the choice of whether to subscribe at all), it appears quite clear that Proposition 218 does not apply in such a situation.

The terms of the contract between a public agency and a franchisee may provide a basis for claiming that a public agency must comply with the Proposition 218 procedures in negotiating and entering into a franchise agreement which limits fees the franchisee may charge. The argument that Proposition 218 applies to a franchisee will be stronger with regard to franchise agreements which reserve to the public agency the right to set fees paid by customers and the obligation to enforce payment in the event of delinquency, than to franchise agreements which do not reserve such rights to the public agency.

Substantive Restrictions on Property-Related Fees And Charges

Amount of Fees

What substantive requirements must a fee or charge subject to Proposition 218 meet?

A fee or charge must meet all of the following requirements:

- Revenues derived from the fee or charge must not exceed the funds required to provide the property related service.
- Revenue from the fee or charge must not be used for any purpose other than that for which the fee or charge is imposed.
- The amount of a fee or charge imposed upon any parcel or person as an incident of property ownership must not exceed the proportional cost of the service attributable to the parcel.
- The fee or charge may not be imposed for service unless the service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted. Standby charges must be classified as assessments and must not be imposed without compliance with the proportionality requirements for assessments.

- No fee or charge may be imposed for general governmental services such as police, fire, ambulance or libraries, where the service is available to the public in substantially the same manner as it is to property owners.

Cal. Const. art. XIID, § 6(b).

In any legal action contesting the validity of a fee or charge, the burden is on the agency to demonstrate compliance with Proposition 218. Cal. Const. art. XIID, § 6(b)(5).

How does Proposition 218 apply to fees subject to its restrictions?

Many of the substantive requirements that Proposition 218 imposes upon fees are similar to existing statutory and decisional law mandates in their focus upon a reasonable relationship between the nature of the service provided to the user, and the fee imposed upon the user for the service. *See, e.g.,* Cal. Gov't Code § 66013 *et seq.*, § 66016 *et seq.* However, Proposition 218 expands these fee requirements by requiring a parcel-specific determination, in the form of a finding regarding the relationship between the fee imposed on the parcel and the proportional cost of the service provided to that parcel.

As a general matter, most fees and charges are currently adopted by the governing body of a local government following a public hearing. The fee, the amount of which is usually based on the sum reasonably necessary to cover the costs of providing the service or activity, may not be levied for general revenue purposes. *Pennell v. City of San Jose*, 42 Cal. 3d 365, 375, 228 Cal. Rptr. 726 (1986). The amount of the fee directly allocated to a user must bear a fair or reasonable relationship to the user's burdens on or benefits from the service or activity provided. *San Diego Gas & Elect. Co. v. San Diego County Air Pollution Control Dist.*, 203 Cal. App. 3d 1132, 1146, 250 Cal. Rptr. 420 (1988) *rev. denied* (1988).

Under Proposition 218, a local government may only impose, extend or increase existing fees or charges beyond June 30, 1997, if the fee or charge in question meets each of the five restrictions contained in article XIID, section 6(b) set forth above.

***Practice Tip:** In determining the cost of or the funds required to provide the service, Proposition 218 does not define or identify the types of costs or expenses that may be included in the fee. California courts, however, have found that such costs typically include the expense of direct regulation as well as all incidental expenses, including administrative, inspection, maintenance and enforcement costs. See *United Business Commission v. City of San Diego*, 91 Cal. App. 3d 156, 166, 154 Cal. Rptr 263 (1979). Therefore, an argument exists that the costs required to provide the service include both direct and indirect costs incurred by a local government, including the costs of complying with Proposition 218.*

The restrictions set forth in sections 6(b)(1) and 6(b)(2) of article XIID do not differ substantively from the requirements currently in effect. For example, section 6(b)(1) provides that the fee or charge may not exceed the funds required to provide the service. Like existing law, therefore, Proposition 218 requires a nexus or connection between the existing fee or charge and the service or activity for which the fee or charge is imposed.

In section 6(b)(2), Proposition 218 also requires that the proceeds from the existing fee or charge may not be used for purposes other than that for which the fee or charge was imposed. This requirement likely is subsumed within the general requirement that the fee may not exceed the cost of providing the specific service to the user. However, to the extent that a fee subject to Proposition 218 raises revenue for purposes incidental to the service provided, modifications may be required under Proposition 218.

Practice Tip: Findings (based upon reasonable considerations) could be made determining that the incidental costs associated with providing the service are a standard component of the fees or charges. See San Diego Gas & Electric Co. v. San Diego County Air Pollution Control Dist., 203 Cal. App. 3d 113, 250 Cal. Rptr. 420 (1988). Further, in order to demonstrate that the proceeds generated from the fee or charge are not being used for other purposes, and that the cost of the service is dependent on and does not exceed the amount of funds generated by the fee or charge, a local agency may find it helpful to deposit the fees or charges into a separate account or fund. However, this procedure is not required by Proposition 218.

Article XIID, section 6(b)(3) further provides that the amount of the fee or charge may not exceed the proportional cost of the service attributable to the parcel on which the fee is imposed. This restriction could be interpreted simply to mean that the amount of the fee or charge must bear a “fair” or “reasonable” relationship to the parcel's burdens on or benefits from the service or activity provided, consistent with existing law. However, while a precise mathematical formula may not be required, section 6(b)(3) does appear to go further than existing law and mandate an individualized determination of the amount of the fee to be imposed based on the level or amount of service provided to or conferred upon the specific parcel in question. Proposition 218 provides no direction regarding how such determinations should be made.

Practice Tip: Presumably, standard utility methodologies, founded upon evidence-based assumptions regarding the level of service or impact per unit (such as the quantity of sewage generated per person or per square foot of occupied space, or per-acre water consumption by occupied land use) may serve as the basis for such individualized determinations.

A fee or charge imposed for a service must be actually used by or immediately available to the owner of the property in question. *See* Cal. Const. art. XIID, § 6(b)(4). Fees or charges based on potential or future use of a service are not permitted. Under Proposition 218, standby charges are considered assessments and subject to the provisions of article XIID, section 4. *See* discussion elsewhere in this guide concerning which standby charges may be grandfathered.

Fees for general governmental services such as police, fire, ambulance or library services, are prohibited by Proposition 218. *See* Cal. Const. art. XIID, § 6(b)(5). The test is whether the service is available to the public at large in substantially the same manner as it is to property owners.

Restrictions on Use of Fee Revenues

Are general fund transfers from enterprise funds (sewer, water and garbage funds) prohibited?

The drafters of Proposition 218 have asserted that such transfers violate article XIID, section 6(b)(1) and (2). These sections provide that revenues derived from a property-related fee or charge must not exceed the funds required to provide the service and revenues derived from the fee or charge must not be used for any purpose other than that for which the fee or charge was imposed.

Public agency practices with respect to such transfers are not uniform and have varying underlying rationales. Some charter cities, for example, have provisions in their charters authorizing such transfers. Sometimes these transfers are articulated as being “in-lieu” of the property taxes and franchise fees that the city would receive if the service in question (for example, water supply or refuse collection) was provided by a private entity. Other times, the city has used such transfers as an estimate of the cost of other services (police, fire and public works, for example) which contribute to the public agency’s effective operation of the enterprise.

As already noted, some of the utility and enterprise service fees collected by public agencies are not imposed upon a parcel or as an incident of property ownership; they therefore are not subject to Proposition 218’s requirements. With respect to these services, Proposition 218’s substantive limitations would not apply. *But see* Cal. Gov’t Code § 50076 (defining the term “special tax” as including fees which exceed the reasonable cost of providing service or regulatory activity).

Even if Proposition 218 does apply, there would be no violation of article XIID, sections 6(b)(1) and (2) to the extent a public agency is able to articulate why the transfer is justified as part of the cost of providing the service, based on the enterprise’s or utility’s fair share of the costs incurred in receiving services from the agency’s general fund operations.

For example, franchise fees generally compensate a public agency for a private utility's use of the rights-of-way, including the wear and tear that use involves. A public agency's water and wastewater systems also benefits from their use of the public rights-of-way for the pipelines for their distributions and/or collection systems. The theory is the agency's system should pay for its fair share of the costs that the general fund incurs in owning and maintaining the streets.

Likewise, a wastewater treatment plant, at which hazardous chemicals such as chlorine might be stored and used, is served by the hazardous materials response capabilities of a public agency's fire department. Other services provided by a public agency's general fund involve a nexus between the services received by the utility or enterprise activities and the general fund's cost of providing this service (and the corresponding amount of the fund transfer).

A number of municipal attorneys believe an argument can be made that when a public agency operates a utility it is entitled to a "fair return" on its investment. This approach is based on the California Supreme Court's decision in *Hansen v. City of San Buenaventura*, 42 Cal. 3d 1172, 233 Cal. Rptr. 22 (1986), *rehearing denied* (1987). Under this reasoning, inclusion of a rate of return is a proper component of the cost of providing the service. *See also Brydon v. East Bay Municipal Utility District*, 24 Cal. App. 4th 178, 29 Cal. Rptr. 2d 128 (1994), *rev. denied* (1994) (citing *Hansen* for the proposition that "... municipal utilities are entitled to incorporate a reasonable rate of return on investment on rates charged customers ..."). It is important to note in this regard that the group of citizens who are utility ratepayers and the group who are the ultimate owners of the system are not necessarily synonymous. This is why a number of analysts believe strict allocation of costs to the proper public funds serves the public interest.

Courts have also recognized a public agency, acting in its proprietary capacity, has the same rights and liabilities as would a private person or entity. *See Davoust v. City of Alameda*, 149 Cal. 69, 84 P. 760 (1906); *City of South Pasadena v. Pasadena Land & Water Co.*, 152 Cal. 579, 93 P. 490 (1908). Privately-owned utilities are generally entitled to a fair return as a component of cost of service rate making. *See, e.g., Accounting for Public Utilities* (Matthew Bender 1991) at 3-10 through 3-12 (explaining from a utility accounting perspective, inclusion of a rate-of-return is not considered to be a "profit" and that "when rates are functioning properly, the utilities recovers the cost of service as viewed under the regulatory principles and not profit or loss is provided.")

Not all attorneys are of the view inter-fund transfers are permissible. Some believe that Proposition 218's passage removed the legal justifications for inter-fund transfers and superseded the authorities cited above.

Practice Tip: Some cities agencies have used enterprise fee revenues to repay their general funds for donations of land or facilities to the enterprise from the general fund. Those agencies view the “donations” as contributed capital and charge interest back to the date of the contribution if the accumulated cost of repayment is significant, the agencies structure the reimbursement as long-term debt, payable in annual increments, with interest). These agencies reason that, in the absence of these contributions, the ratepayers would have had to absorb the cost in the first place.

Are there other restrictions on the practice of making general fund transfers from enterprise funds (sewer, water and garbage funds)?

Such transfers have always been susceptible to arguments that they may violate Propositions 13 and 4. Government Code section 50076, adopted to implement Proposition 13, provides that “. . . ‘special tax’ shall not include any fee which does not exceed the reasonable cost of providing the service or regulatory activity for which the fee is charged and which is not levied for general revenue purposes.” Proposition 4, which added article XIII B to the California Constitution, defines “appropriations subject to limitation” to include the proceeds of taxes. Section 8(c) of article XIII B defines “proceeds of taxes” to include

proceeds . . . from . . . user charges, and user fees to the extent those proceeds exceed the costs reasonably borne . . . in providing the . . . product, or service . . .

Thus, even if not subject to Proposition 218, the calculations supporting transfers from utility funds still need to show why the utility fees or charges do not exceed the reasonable cost of providing the service.

Practice Tip: Under either the in-lieu transfer rationale or the fair rate-of-return approach, as well as to avoid allegations of Proposition 13 or 4 violations, a public agency will have to be able to articulate the connection between the transfers and the cost of the services that the utility is receiving from the general fund operations, as well as why the rates are properly crafted and reasonable. In this regard, public agencies can best protect themselves by setting their rates for service in accordance with cost-of-service studies as a part of their rate-making procedure. Such studies are also important under Proposition 218, since article XIID places the burden of proof on the public entity. See also *Beaumont Investors v. Beaumont-Cherry Valley Water District*, 165 Cal. App. 3d 227, 211 Cal. Rptr. 567 (1985), *rev. denied* (1985).

Practice Tip: To calculate an enterprise fund’s fair share of city overhead expenses, some public agencies use an organization-wide cost allocation plan based on the federal Office of Management and Budget’s A-87 standards. This document was originally created in the 1960’s to help local governments determine appropriate levels of reimbursement for indirect costs associated with administering federal grant programs.

Can the revenue collected from franchise fees paid by private entities be transferred to the public agency's general fund? Is there any limitation or impact on how that revenue is allocated?

Proposition 218 does not contain restrictions on transferring revenue collected from franchise fees to the general fund. Note too that the franchise fees can be collected in the general fund, with appropriate amounts transferred back into enterprise funds. Franchise fees do not have to be collected in enterprise funds.

Do property-related fees have to be imposed on other public agencies to ensure that they are proportional to the cost of providing service for each property?

Although this is not directly addressed by Proposition 218, it is arguable that if other public agencies are not charged their share, the fee imposed on the nonpublic agency property owners would "exceed the proportional cost of the service attributable to the parcel" unless the public agencies' share is paid from a different source of revenues. *See* Cal. Const. art. XIID, § 6(b)(3).

Procedural Requirements

What are the procedures for adoption of a fee or charge required by Proposition 218?

There are three procedural issues for fees or charges subject to Proposition 218:

- Notice requirements,
- Hearing requirements, and
- Voter-approval requirements.

This section will discuss each issue.

Notice Requirements

What steps does Proposition 218 require for notifying property owners of proposals to impose or increase fees or charges affected by Proposition 218?

- The agency must identify the parcels upon which a fee or charge is proposed for imposition. Cal. Const. art. XIID, § 6(a)(1).
- The amount of the fee or charge proposed to be imposed upon each parcel must be calculated by the agency. Cal. Const. art. XIID, § 6(a)(1).

- The agency must provide written notice by mail of the proposed fee or charge to the record owner of each identified parcel upon which the fee or charge is proposed for imposition. Cal. Const. art. XIIIID, § 6(a)(1). Proposition 218 does not define what “record owner” means. While there may be other interpretations of what will constitute “record” ownership, the most reasonable reading of this provision will require the agency to use the latest equalized assessment rolls available from the county assessor. As such, the agency would send one notice for each parcel to the owner or owners at the address shown on the assessor's rolls. Legislative clarification on whether use of the latest equalized assessment rolls is sufficient to provide notice to record owners would be helpful.
- The notice to record owners of property must contain all of the following:
 - * The amount of the fee or charge proposed to be imposed upon each parcel; and
 - * The basis upon which the amount of the proposed fee or charge was calculated; and
 - * The reason for the fee or charge; and
 - * The date, time and location of a public hearing on the proposed fee or charge.

Cal. Const. art. XIIIID, § 6(a)(1).

Hearing Requirements

What hearing requirements does Proposition 218 impose for proposals to impose or increase fees or charges affected by Proposition 218?

The agency must conduct a public hearing on the proposed fee or charge at least 45 days after mailing the notice described above. The hearing is to be conducted in the following manner:

- At the public hearing, the agency must consider all protests against the proposed fee or charge.
- If written protests against the proposed fee or charge are presented by a majority of owners of the identified parcels, the agency may not impose the fee or charge.

Cal. Const. art. XIIIID, § 6(a)(2).

Voter Approval Requirements

Which fees and charges must receive voter approval?

New or increased fees and charges subject to Proposition 218, except for sewer, water and refuse collection services, must receive voter-approval. *See* Cal. Const. art. XIID, § 6(c). Note that some attorneys believe sewer, water and refuse collection charges, if imposed as an incident of property ownership, are subject to Proposition 218's noticed public hearing and majority protest provisions. Cal. Const. art. XIID, § 1(a) (no exclusion for sewer, water and refuse collection charges). See discussion at pages 54 to 57 of this guide.

When must the election be held?

The election must be conducted not less than 45 days after the public hearing. Cal. Const. art. XIID, § 6(c).

What procedures must be used to conduct the election?

Proposition 218 does not specify procedures for the conduct of property related fees and charges elections. However, the agency may adopt procedures that are similar to those required for assessments. Cal. Const. art. XIID, § 6(c); Cal. Const. art. XIID, § 4.

Who gets to vote in the election?

The agency has two options:

- A property owner vote, which requires a majority vote of approval
- A two-thirds vote of the electorate residing in the affected area .

Cal. Const. art. XIID, § 6(c).

There is one ballot per parcel if an agency uses a property owner vote. Cal. Const. art. XIID, § 4(d). The voters are the "owners of the property subject to the fee . . ." Cal. Const. art. XIID, § 6(c).

Unlike the assessment procedure, there is no authority or requirement to weight the ballots according to the financial obligation of the affected property. *Compare* Cal. Const. art. XIID, § 4(e) ("In tabulating the ballots, the ballots shall be weighted according to the proportional financial obligation of the affected property.") *with* Cal. Const. art. XIID, § 6(c) (requiring a majority vote of the property owners of the property subject to the fee or charge).

Given the “one parcel, one vote” system for property owner elections on fees and charges, one may imagine scenarios where the election procedure could violate the equal protection rights of property owners. For example, numerous small parcels under common ownership would receive many votes while a larger undivided parcel would have only one vote. If the fee is based upon square footage of property, one might argue that the rights of the large property owner are harmed.

Timing Issues

Substantive Provisions

Do the substantive provisions of Proposition 218 apply to existing fees and charges?

The text of Proposition 218 is not clear on the issue.

The uncertainty results from the fact that the restrictions on fees are set forth in article XIID, section 6(b), entitled “Requirements for *Existing*, New or Increased Fees and Charges,” (emphasis added) while the text of this section merely provides that the restrictions apply to fees or charges that are “extended, imposed or increased” by an agency. The text does not specifically define the term “extended” nor does it state whether the restrictions of section 6(b) apply to “existing” fees or charges.

A literal interpretation of the term “extended” suggests that the duration of imposition of the fee or the area to which it applies must be expanded by further legislative action, not simply the passive conduct of continued collection of fees or charges. In other words, fees or charges that are “extended” require an affirmative action on the part of the legislative body. Examples of this would be the repeal of a sunset clause or the expansion of the scope or coverage of a fee or charge. Note also that in article XIIC concerning taxes, the phrase used repeatedly in section 2 is “impose, extend or increase” and clearly with regard to taxes the term “extend” means an affirmative action and not merely the passive act of allowing the tax to continue.

The only possible indication in the text concerning Proposition 218’s application to existing fees is article XIID, section 6(d), which provides that, “[b]eginning July 1, 1997, *all* fees and charges shall comply with this Section” (emphasis added). The use of the term “all” can be construed to mean both new and existing fees.

Furthermore, the language concerning taxes and fees differs from the language used in Proposition 218 regarding the effective date for assessments. Article XIID, section 5, provides that, “[b]eginning July 1, 1997, all *existing*, new or increased assessments shall comply with this Article.” (emphasis added) The lack of a specific reference to “existing” fees, when contrasted with the language relating to assessments, further weakens any inference from section 6(d) that “all” fees include existing fees.

Despite the language discussed above, there is language in the November 1996 ballot pamphlet that indicates that Proposition 218 applies to all existing fees that continue in effect after July, 1997. Furthermore, to interpret the provisions of an initiative measure, the California Supreme Court says:

California courts have held that constitutional and other enactments ‘must receive a liberal, practical common-sense construction’ which will meet ‘changed conditions and the growing needs of the people’ [citation]. In addition, when . . . the enactment follows voter approval, the ballot summary and arguments and analysis presented to the electorate in connection with a particular measure may be helpful in determining the probable meaning of uncertain language.

Amador Valley Joint Union High School District v. Board of Equalization, 22 Cal. 3d 208, 245-246, 149 Cal. Rptr. 239 (1978).

In the ballot pamphlet for Proposition 218, neither the Official Title and Summary prepared by the Attorney General, nor the analysis and ballot arguments, explicitly address whether existing fees or charges are subject to the procedural requirements of the measure. The summary merely states that “fees and charges are limited to the cost of providing the service and may not be imposed for general governmental services available to the public.”

However, with respect to the substantive requirements of section 6(b), the analysis prepared by the Legislative Analyst makes no distinctions between existing or new fees and states that the measure requires “all property-related fees” to comply with these requirements by July 1, 1997. Additionally, in addressing the fiscal impact of the initiative, the Legislative Analyst determines that, with respect to existing revenues, “by July 1, 1997, local governments would be required to reduce or repeal existing property-related fees . . . that do not meet the measure’s restrictions on (1) fee . . . amounts or (2) the use of these revenues.” These statements seemingly support the interpretation that Proposition 218 applies to existing fees and charges. Section 5 of Proposition 218 provides that the provisions of the initiative “shall be liberally construed to effectuate its purposes of *limiting local government revenue* and enhancing taxpayer consent” (emphasis added). Therefore, there is a strong possibility that the substantive restrictions set forth in section 6(b) of article XIID may be interpreted by the courts to apply to existing fees, as well as new or increased fees.

However, a number of attorneys believe a fair reading of Proposition 218 is that public agencies do not have to submit existing fees to the Proposition 218’s procedural requirements, so long as the fees are not being increased. However, those attorneys believe existing fees do have to meet Proposition 218’s substantive requirements. These attorneys believe that, read literally, the procedural requirements in subsections (a) and (c) do not apply to existing fees and charges. The only reference to existing fees is in subsection (b) and those are the substantive provisions.

These attorneys conclude if existing fees can satisfy Proposition 218's substantive provisions, those fees can remain in effect.

When does Proposition 218 apply to fees?

Article XIID, section 6(d), provides that "all fees or charges" must comply with Proposition 218 beginning July 1, 1997. As discussed above, this effective date, as well as the substantive provisions of Proposition 218, may apply to existing fees as well as new or increased fees.

Procedural Provisions

If a new fee was established in 1996 prior to the adoption of Proposition 218 and it meets the substantive requirements of Proposition 218, is it exempt from the procedural requirements so long as it is not raised?

Yes. Under article XIID, section 6, subsections (a) and (c), the procedures apply only to new and increased fees.

Prior to July 1, 1997, can existing fees or charges be increased or new fees or charges adopted without having to comply with either the substantive or procedural requirements of section 6?

Some have suggested a window of opportunity may exist whereby the requirements of section 6, both substantive and procedural, need not be followed provided that increases to existing fees or charges or the adoption of new fees or charges are enacted prior to July 1, 1997. This would mean that, in adopting increased or new fees or charges, a local government would not need to provide the type of detailed notice described in section 6(a)(2) or obtain approval of the voters as required by section 6(c). Although arguments may be made in support of such an approach, attorneys caution that there is a strong possibility of being challenged and those challenges could be successful.

***Practice Tip:** It is important to note that any fees or charges that are increased or adopted will undoubtedly be considered "existing" fees or charges on the effective date. Therefore, as a practical matter and in anticipation of the July 1, 1997 deadline, assuming that the substantive requirements of section 6(b) apply to existing fees or charges, it may be advisable for a local government to insure that in adopting the increased or new fees or charges, Proposition 218's substantive requirements are satisfied.*

A more cautious interpretation is that a window of opportunity does not exist and the procedural requirements of section 6 must be complied with as of the effective date of Proposition 218 (November 6, 1996). In this case, before fees or charges can be increased or adopted, a local government would need to provide mailed notice to property owners of record and obtain voter approval in conformance with section 6(a)(2) and section 6(c), respectively.

Initiatives to Reduce or Repeal Fees

Who can circulate/sign/vote on initiatives and referenda affecting fees?

Although the provisions of article XIIC allow the use of initiatives to reduce or repeal any local fee or charge, and the provisions of article XIID permit record owners of property, regardless of place of residence, to protest and vote on fees and charges, the requirements of the Elections Code pertaining to initiatives with regard to being a registered voter in the jurisdiction appear to be unaffected. This issue is discussed in more detail in section IV of this guide.

IV. Proposition 218's Effect On The Initiative Power

Introduction and Overview

The stated intent of Proposition 218's sponsors in adding language to the California Constitution relating to the electorate's initiative powers was to "constitutionalize" the California Supreme Court's holding in *Rossi v. Brown*, 9 Cal. 4th 688, 693, 38 Cal. Rptr. 2d 363 (1995). In *Rossi*, the court held the electorate had authority to repeal tax measures prospectively without offending other constitutional provisions excluding tax measures from the electorate's referendum powers. *See generally* Cal. Const. art. II, §§ 8, 9.

Proposition 218 adds the following language to the California Constitution, as part of section 3 of article XIIC:

SEC. 3. Initiative Power for Local Taxes, Assessments, Fees and Charges.

Notwithstanding any other provision of this Constitution, including, but not limited to, Sections 8 and 9 of Article II, the initiative power shall not be prohibited or otherwise limited in matters of reducing or repealing any local tax, assessment, fee or charge. The power of initiative to affect local taxes, assessments, fees and charges shall be applicable to all local governments and neither the legislature nor any local government charter shall impose a signature requirement higher than that applicable to statewide statutory initiatives.

This section of this guide examines what revenue sources are potentially affected by Proposition 218's initiative provisions, as well as the legal and procedural issues Proposition 218's initiative provisions create. The section concludes with the League's standard caution about limits on public agency communications in ballot measure campaigns.

Revenue Sources Potentially Affected

What local taxes, assessments, fees and charges are potentially affected?

The answer is unclear. All local taxes are potentially affected, however attorneys disagree over whether *all* local assessments, fees, and charges are potentially affected—or just those related to property and not otherwise exempt from Proposition 218.

The difficulty is that Proposition 218's initiative provisions (in article XIIC) were added to the California Constitution along with article XIID. Some attorneys argue that section 3 was only intended to allow the use of the initiative to reduce or repeal the taxes, assessments, fees, or charges that are affected by and subject to Proposition 218.⁴

On the other hand, an argument can be made that the plain language of article XIIC, section 3 requires a broader reading. Article XIIC contains no definitions of assessments, fees or charges. It does not refer to article XIID and that article's express and implied exemptions for certain assessments, fees or charges. Finally, section 5 of Proposition 218 directs:

The provisions of this act shall be liberally construed to effectuate its purpose of limiting local government revenue and enhancing taxpayer consent.

Proposition 218 (uncodified). These factors suggest all local government assessments, taxes, fees and charges are subject to being repealed or reduced by the initiative process.

Does Proposition 218 expand the initiative power?

The answer is yes. To some extent, this provision "constitutionalizes" the recent decision of the Supreme Court in *Rossi v. Brown*, which upheld a San Francisco initiative that repealed a tax. *See Rossi v. Brown*, 9 Cal. 4th 688, 693, 38 Cal. Rptr. 2d 363 (1995).

Proposition 218 goes further than *Rossi*, however, as it extends the initiative power to assessments which had previously been considered beyond the initiative power. *See Chase v. Kalber*, 28 Cal. App. 561, 569, 153 P. 397 (1915).

⁴ The following revenue measures are exempt from Proposition 218's requirements:

- Fees or charges imposed as a condition of property development, *see* Cal. Const. art. XIID, § 1(b);
- Timber yield taxes, *see* Cal. Const. art. XIID, § 1(c);
- Electrical or gas service fees, *see* Cal. Const. art. XIID, § 3(b); and
- Fees or charges that are not imposed as an incident of property ownership, or for a property-related service (for example, copy fees), *see* Cal. Const. art. XIID, § 2(e).

In addition, taxes, fees, and assessments adopted by a local legislative body pursuant to authority delegated to it by the state Legislature may no longer be ineligible for repeal by initiative. Prior to *Rossi*, fees were regarded as "taxes," immune from the initiative power. See *Dare v. Lakeport City Council*, 12 Cal. App. 3d 864, 867-868, 91 Cal. Rptr. 124 (1970). The *Rossi* court distinguished *Dare* by concluding that the real basis for the court's ruling was that "the Legislature had vested the local legislative body with the power to fix" the sewer fees in question. *Rossi*, 9 Cal. 4th at 708. This suggests that after *Rossi* all fees, with the possible exception of those established pursuant to authority delegated by the Legislature, were subject to the initiative power.

Does article XIIC, section 3 expand the availability of the initiative to repeal development impact fees?

Probably not, because Proposition 218 contains a provision which indicates it does not affect existing laws relating to the imposition of development fees from Proposition 218. This exemption is found in article XIID, section 1 which provides:

Nothing in this Article or Article XIIC shall be construed to:
... (b) affect existing laws relating to the imposition of fees or charges as
a condition of property development ...

Development impact fees are typically imposed as a condition upon approval of property development. See *Russ Bldg. Partnership v. City and County of San Francisco*, 199 Cal. App. 3d 1496, 246 Cal. Rptr. 21 (1987), *aff'd in part and rev'd in part*, 44 Cal. 3d 839, 244 Cal. Rptr. 682 (1988).

Under existing law, the typical development fee ordinance should theoretically be subject to repeal by initiative as would any legislative matter. However, a specific decision by a city that imposes a fee as a condition to granting a discretionary approval for a particular development project is not subject to repeal by initiative because such a decision is an adjudicatory (not legislative) act. See *Wiltshire v. Superior Court (City of San Marcos)*, 172 Cal. App. 3d 296, 218 Cal. Rptr. 199 (1985).

Finally, under existing law, there is a case where the court held that an unusual development impact fee was immune from the initiative. The development impact fee involved in *Committee of Seven Thousand v. Superior Court (City of Irvine)*, 45 Cal. 3d 491, 511-512, 247 Cal. Rptr. 362 (1988), involved a matter of statewide concern. The California Supreme Court ruled that the Legislature had delegated the power to impose this fee solely to the city council. Therefore, as stated by the court in *Rossi*:

The state has plenary authority over matters of statewide concern and, in areas in which the Legislature has specifically and exclusively delegated authority in those matters to a local legislative body, may bar exercise of either referendum or initiative.

Rossi, 9 Cal. 3d at 698, n.4.

As these court decisions are part of the "existing laws" referred to in this exemption, wherever the power to impose development impact fees is exclusively delegated to city councils, *see, e.g.*, Cal. Gov't Code § 66484.3, such fees should not be subject to repeal by initiative. From a practical standpoint, since most impact fees are paid by the developers at the time of construction, there are not likely to be many occasions when voters become interested in repealing such fees.

There is another possible limitation on the use of an initiative to repeal a development fee. If the requirement for adopting a paying development fee was contained in a development agreement with a property owner, or was part of some other contract, the constitutional impairment of contracts limitation could be implicated. See discussion on impairment of contracts below.

Are there any other questions relating to the scope of Proposition 218's initiative provisions?

There is some uncertainty in the breadth of the initiative power covered by article XIIC section 3. This provision first states that "the initiative power shall not be prohibited or otherwise limited in matters of reducing or repealing" taxes, assessments or fees. The next sentence states:

The power of initiative to *affect* local taxes, assessments, fees and charges shall be applicable to all local governments and neither the legislature nor any local government charter shall impose a signature requirement higher than that applicable to statewide statutory initiatives."

Cal. Const. art. XIIC, § 3 (emphasis added).

By using the term "affect" instead of the more specific terms "reducing" and "repealing" used in the preceding sentence of this section, it is not clear if something more was intended. It appears that the term "affect" only means reducing and repealing taxes, assessments, fees and charges.

Presumably these provisions of Proposition 218 were not intended to alter the breadth of the initiative power, but were aimed at expressly declaring that this prohibition against limiting the initiative power to reduce and repeal taxes, assessments, and fees (in other words, to "affect" them) extended, as it says, "to all local governments." This ensures the availability of this use of the initiative power in charter cities and any other local or regional governmental entities that

already have the power to impose taxes, assessments or fees. See definition of "local governments" in article XIIC section 1(b).

This interpretation is supported by reading this sentence in conjunction with article XIID section 1(a) which states nothing in Proposition 218 must be construed to "provide any *new* authority to any agency" to impose a tax, assessment or fee. Conceivably, this latter provision would be violated if the word "affect" were interpreted broadly to add to local governments revenue-raising authority by authorizing them to impose new taxes, assessments, or fees by initiative.

However, Proposition 218's use of the word "affect" could be interpreted to mean the initiative power extends to such matters as extending the life, increasing the amount, creating or deleting exemptions, and modifying refund procedures for existing taxes, assessments and fees, as well as reducing and repealing them (but not imposing new taxes as prohibited by article XIID section 1(a)). This interpretation is somewhat weakened by the fact that the initiative power arguably already can be used to make these sorts of changes to existing taxes, assessments and fees because such changes are legislative matters traditionally subject to initiatives. See *Dye v. City of Compton*, 80 Cal. App. 2d 486, 182 P.2d 623 (1947) (allowing use of referendum under city charter to repeal part of a sales tax ordinance.). This interpretation would make this provision redundant which undermines it as a likely intention of the voters.

Is there anything in Proposition 218's initiative provisions which would suggest that the initiative power is being extended to adjudicatory (as opposed to legislative) matters?

No. There is nothing in Proposition 218 or its "legislative history" that the voters intended to extend the initiative power to adjudicatory matters, even though Proposition 218 must be liberally construed to effectuate its purposes to limit local government revenue and enhance taxpayer consent. See Proposition 218, § 5 (uncodified).

Constitutional and Other Restrictions On the Initiative Process

Are *existing* local fees, taxes, and assessments that have been formally pledged to repay bonds or other debt protected from the initiative power by the contract clause of the United States Constitution?

The answer is maybe, depending upon the facts and circumstances. In general, bonds and other public securities constitute contracts that fall within the purview of state and federal constitutional prohibitions against impairing the obligations of contract. Cal. Const. art. I, § 9; U.S. Const. art. I, § 10.

Since in this case, the California Constitution has been amended, the federal prohibition applies:

It follows, accordingly, that even though a state may by constitutional amendment supersede its own constitutional protection for contracts, such modification and any law adopted pursuant thereto still must pass federal constitutional muster.

Allen v. Board of Administration, 34 Cal. 3d 114, 119, 192 Cal. Rptr. 762 (1983).

The usual rule is that the law in effect at the time bonds or other public securities are issued becomes a part of the contract; the law cannot be changed afterward to the detriment of the bondholders' contractual rights without their consent. *County of San Bernardino v. Way*, 18 Cal. 2d 647, 661, 117 P.2d 354 (1941); *Islais Co. v. Matheson*, 3 Cal. 2d 657, 662-663, 45 P.2d 326 (1935), *rehearing denied* (1935). To constitute an impairment the change in the law must adversely affect the bondholder's rights "in a material degree." *County of San Bernardino v. Way*, 18 Cal. 2d at 663. For example, a reduction in security pledged may not be material if that security had no actual value. *Id.* at 664.

Accordingly two lines of argument are:

- Any initiative that would reduce pledged revenue impairs the security of the contract with bondholders. Thus, any proposed reduction, much less repeal, cannot be sanctioned.
- Since the law in effect at the time of debt issuance did not permit the initiative power to be used to repeal or reduce taxes, assessments, fees, or charges, Proposition 218 cannot be used to authorize repeal or reduction of taxes, assessments, fees, and charges that comprise the security for the indebtedness. (As to local taxes, this argument presupposes the debt was issued prior to *Rossi vs. Brown* in 1995. As to fees, the argument assumes that the fees securing the debt could have been viewed as administrative in nature.).

However, not every impairment constitutes an unconstitutional impairment. The right of the state to exercise its police powers is recognized by courts as an essential component of the impairment analysis. Where the impairment is viewed as minor, greater latitude is given to the exercise of the police power, and an unconstitutional impairment may not be found. But where the impairment is substantial, the state's rationale for its law will be subject to greater scrutiny.

The state law may not be given effect if a more narrowly tailored law or action could have accomplished the state's purpose without impairing the contract. As summarized by the California Supreme Court:

The United States Supreme Court has observed, "Although the Contract Clause appears literally to proscribe 'any' impairment . . . 'the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula.' [Citation.] Thus, a finding that there has been a technical impairment is merely a preliminary step in resolving the more difficult question whether that impairment is permitted under the Constitution." (*United States Trust Co. v. New Jersey* (1977) 431 U.S. 1, 21 [52 L. Ed. 2d 92, 109, 97 S. Ct. 1505].) An attempt must be made "to reconcile the strictures of the Contract Clause with the 'essential attributes of sovereign power,' . . ." (*Ibid.*) For example, "[m]inimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation. *Allied Structural Steel Co. v. Spannaus* (1978) 438 U.S. 234, 245 [57 L. Ed. 2d 727, 737, 98 S. Ct. 2716], fn. omitted; accord *Valdes v. Cory* (1983) 139 Cal. App. 3d 773, 789 [189 Cal. Rptr. 212]. The high court also has expressed the relevant principles another way: The constitutional prohibition against contract impairment does not exact a rigidly literal fulfillment; rather, it demands that contracts be enforced according to their 'just and reasonable purport'; not only is the existing law read into contracts in order to fix their obligations, but the reservation of the essential attributes of continuing governmental power is also read into contracts as a postulate of the legal order. *City of El Paso v. Simmons* (1965) 379 U.S. 497, 508 . . .; *Home Building & Loan Assn. v. Blaisdell* [1934] 290 U.S. [398,] 428-429, 434-435 . . .) The contract clause and the principle of continuing governmental power are construed in harmony; although not permitting a construction which permits contract repudiation or destruction, the impairment provision does not prevent laws which restrict a party to the gains 'reasonably to be expected from the contract.' (*City of El Paso v. Simmons*, *supra*, 379 U.S. at p. 515 . . .) Constitutional decisions 'have never given a law which imposes unforeseen advantages or burdens on a contracting party constitutional immunity against change.' (*Ibid.*; see 70 Dick. L. Rev. 524-534 (1966); 56 Column L. Rev. 251-270 (1956).)" *Lyon v. Flournoy*, *supra*, 271 Cal. App. 2d at p. 782; accord *Coast Bank v. Holmes* (1971) 19 Cal. App. 3d 581, 596 [97 Cal. Rptr. 30].)

Allen, 34 Cal. 3d at 119-120.

Two United States Supreme Court cases further illustrate the analysis. In *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U.S. 398, 54 S. Ct. 231, 78 L. Ed. 413 (1934), the Court upheld the constitutionality of a Minnesota statute extending the period of redemption for mortgages after foreclosure. The subject statute had been enacted during the depression to provide relief to property owners faced with foreclosure. The Court found that the legislation was a valid exercise of the police power to protect a basic societal interest, was narrowly tailored to the circumstances, and ultimately did not impair the integrity of the mortgagor's property interest.

On the other hand, the Court found an unconstitutional impairment to a public bond covenant in *United States Trust Co. of New York v. State of New Jersey*, 431 U.S. 1, 97 S. Ct. 1505, 52 L. Ed. 2d 92 (1977). In that case, two states had each repealed a bond covenant restricting the use of revenues pledged as security for port authority bonds. The justification was the need to use some of the restricted funds to finance mass transit improvements. The Court determined that the repeal eliminated an important security provision of the bonds and was neither necessary nor reasonable to achieve the state's goals.

In sum, in reviewing challenges based on the contract clause, courts look at:

- The bond contract language allegedly impaired - is there an impairment?
- The severity of the impairment - is it material or substantial?
- The nature and purpose of the legislation (or state constitutional provision) that impairs the contract.
- Whether an emergency situation exists requiring state action.
- Whether the legislation or constitutional provision is appropriately drawn to address the emergency, or whether it is overbroad.

Whether Proposition 218 will be challenged by bondholders is unknown. But if an initiative proposes to repeal or reduce local assessments, taxes, fees or charges that are pledged to repay bonded indebtedness, public agencies can anticipate bondholder interest in the matter. If a lawsuit is filed to keep the initiative from being placed on the ballot, or after the election, the facts relating to the wording of the bond covenants, the impact of the proposed reduction or repeal, and the purpose behind the initiative will be subject to scrutiny and balancing. There is no assurance that in every instance the courts will strike down the initiative measure.

Are *future* local fees, taxes, and assessments that have been formally pledged to repay bonds or other debt protected from the initiative power by the contract clause of the United States Constitution?

There is an argument these pledges would be protected. The United States Constitution limits the ability of a legislative body--and arguably the citizens acting as the legislative body-- to repudiate debts or the security provided for such debt. Under the contract clause, the legislative body may not revoke a tax which corresponded with a contractual obligation. *See Carman v. Alvord*, 31 Cal. 3d 318, 332, 182 Cal. Rptr. 506 (1982). The people, acting as the legislative body, are subject to the same federal constitutional limitations as apply to their legislative representatives. *See Citizens Against Rent Control v. City of Berkeley*, 27 Cal. 3d 819, 167 Cal. Rptr. 84 (1980).

Is there an argument that the use of Proposition 218's initiative power impairs essential governmental functions?

The argument that the initiative power is not available if its exercise would impair essential governmental functions is one that will likely be raised in attacks to Proposition 218 and the exercise of the initiative authority protected by Proposition 218. This theory has not been conclusively addressed by the California Supreme Court.

This theory was raised unsuccessfully in *Rossi v. Brown*, 9 Cal. 4th at 713, n. 16 (refusing to consider whether courts have authority to restrict the exercise of initiative powers on an *ad hoc* basis on grounds that particular measure impermissibly interferes with legislative body's fiscal management authority). For argument purposes the court assumed the theory was valid, but concluded the facts in *Rossi* did not show the rule was violated. The court described how the San Francisco initiative operated only at the start of the next fiscal year and there was no argument by the city that there were no alternative sources of revenue to replace the utility tax repealed by the initiative. *Id.* at 710. The court in *Rossi* also discussed how the initiative process itself gives the legislative body time to react to the potential loss of revenue due to the time it takes for circulating the initiative petition for signatures and for holding the election. *See id.* at 702-03, 710, and 712-13.

The difficulty of proving that fiscal responsibilities would be impermissibly impaired was also indicated by the decision in *Santa Clara County Transportation Authority v. Guardino*, 11 Cal. 4th 220, 45 Cal. Rptr. 2d 207 (1995), *as modified on denial of rehearing* (1995). The court in that case noted: "In order for the exception to apply the [fiscal] power must not only be 'essential,' [but] its serious impairment or wholesale destruction must also be 'inevitable'." *Id.* at 254.

Does the rule barring the use of initiative to interfere with a power delegated by the state Legislature solely apply to the use of the initiative power under Proposition 218?

Probably not. Another limitation on the initiative power that was left unresolved by the court in *Rossi* was the limitation on repealing a tax in a general law city where the Legislature has delegated the power to impose the tax solely to city councils. *See Rossi*, 9 Cal. 4th at 707 n. 12. Although the language of Proposition 218's initiative provision is awkwardly worded, the purpose of article XIIC, section 3 appears to be to ensure the availability of the initiative power to affect local taxes, assessments, fees or charges.

While article XIII section 24 of the California Constitution, which forbids the Legislature from imposing taxes for local purposes, it authorizes the Legislature to delegate this authority to local governments. *See Guardino*, 11 Cal. 4th at 247. The courts have upheld the power of the Legislature to impose conditions on how a city may exercise a taxing power delegated to it.

Under this authority, the state Legislature formerly could delegate taxing power solely to the city council and thereby intentionally preclude the voters' use of the initiative for repealing a tax enacted by the council. See *Dare v. Lakeport City Council*, 12 Cal. App. 3d 864, 869, 91 Cal. Rptr. 124 (1970) (voiding initiative ordinance which would have set sewer service charges where the Legislature granted such authority to the "legislative body."); *Committee of Seven Thousand v. Superior Court (City of Irvine)*, 45 Cal. 3d 491, 511-512, 247 Cal. Rptr. 362 (1988) (voiding initiative affecting power delegated to "city councils" to impose developer fees for regional transportation facilities).

However, the ability of the Legislature to place conditions upon how a city may exercise its delegated taxing power is not unlimited. As noted by the court in *Guardino*, the Legislature has such authority, "[e]xcept as prohibited or limited by the constitution." *Guardino*, 11 Cal 4th at 248.

Proposition 218 appears to be such a constitutional limitation. Article XIIC section 3 says "the initiative power shall not be prohibited or otherwise limited in matters of reducing or repealing any local tax, assessment, fee or charge." Therefore, the Legislature is likely to be precluded from insulating a tax, assessment, or fee from the initiative by making such an exclusive delegation to a legislative body.

What about other potential federal constitutional challenges?

There may be a scenario in which the use of the initiative power to reduce and repeal taxes, assessments and fees may be subject to legal challenge based on a violation of any applicable federal rights. Whether such a limitation would apply to a particular initiative would depend on the specific facts involved.

The exercise of the initiative power may not violate the equal protection clause or due process of law protections guaranteed by the United States Constitution. An example of an impermissible use of the initiative power would be to reduce part of a utility tax in such a way that the remaining tax only fell on persons of a particular race, religion or gender.

Procedural Issues

What will be Proposition 218's impact on future financings?

At a minimum, public agencies will need to include a discussion of Proposition 218 and its initiative provisions in official statements for bond issues. The relative impact of the measure on the public agencies' revenue stream will need to be discussed. In addition, should an initiative to repeal or reduce a local tax, assessment or fee qualify for the ballot, such event may require disclosure under the continuing disclosure rules.

An initiative is not one of the eleven events listed in Rule 15c2-12 that, if material, must be reported. However, a continuing disclosure undertaking executed by an issuer might include other events that must be reported, including qualification of an initiative for the ballot or its adoption.

What number of registered voters is required to sign an initiative petition that affects a tax, assessment or fee to qualify it for the ballot and what does "affect" mean?

Article XIIC, section 3 ties the required number of signatures to the maximum required for statewide statutory initiatives. The requirement for statutory initiatives is five percent of the number of the votes for all candidates for governor at the last gubernatorial election. *See* Cal. Const. art. II, § 8(b); Cal. Elect. Code § 9035.

Proposition 218 will probably be interpreted to mean five percent of all the votes cast for all candidates for governor within the local government jurisdiction involved, rather than all such votes statewide. *See* Cal. Elect. Code § 9118 (setting the number of required signatures for a county initiative petition at ten percent of the votes cast *in the county* for all candidates for governor).

This five percent requirement is a significant reduction in the number of signatures needed to qualify an initiative petition to affect local taxes, assessments and fees. The number of signatures required for normal initiative petitions in a city is ten percent of the registered voters. *See* Cal. Elect. Code § 9215. Therefore, article XIIC, section 3 lowers the requirement for the number of signatures needed to qualify a tax, assessment or fee initiative petition for the ballot.

If an initiative authorized under Proposition 218 qualifies for the ballot, when must the election on the initiative be held?

Until legislation is adopted addressing this specific subject, a public agency is probably justified in either calling a special election or waiting for the next regular municipal election at which to present the initiative to the voters.

Proposition 218 is silent on this subject. For the usual initiative that qualifies with signatures of at least ten percent of the registered voters, but not 15 percent, the initiative must go to the voters at the next municipal election; if 15 percent or more signatures are obtained, the initiative must go to a specially called election within 103 days. Cal. Elect. Code §§ 9215, 9214.

What voters are entitled to exercise the initiative power under Proposition 218 to reduce or repeal taxes, assessments and fees?

Although article XIIC, section 3 provides that no constitutional provision shall limit the use of the initiative power to reduce or repeal a tax, assessment or fee, it does not discuss the procedure for exercising the initiative power.

The issue arises chiefly in connection with the use of the initiative power to reduce or repeal assessments and fees. Proposition 218 provides that the entire electorate votes on imposing taxes, so the entire electorate would participate in any initiative to reduce or repeal them. However, Proposition 218 largely allows only the property owners who will pay assessments and fees to vote on their imposition. *See* Cal. Const. art. XIID, § 4(a) through (e) (only property owners who would pay the assessment can vote), § 6(c) (majority vote of the property owners subject to the fee or two-thirds vote of the entire electorate).

The most symmetrical approach is to limit the power to reduce or repeal an assessment or fee by initiative to those who must vote to approve imposing an assessment or fee in the first place. This conclusion follows from the rules of construction that all provisions of a new law should be read together and that reading must not contribute to absurd results.

Thus, the "initiative power" protected in article XIIC, section 3 has an implied limitation that this power when used to reduce or repeal an assessment or fee can only be exercised by the affected property owners authorized by Proposition 218 to impose the assessment or fee. Only the owners of the assessed property or the property related to the fee are able to sign the initiative petition and vote on the initiative measure to reduce or repeal the assessment or fee. This interpretation would allow non-resident owners to participate in the initiative. Or, if an agency had opted to let the entire electorate vote on imposing or increasing a fee under article XIID section 6(c), then the full electorate should be entitled to exercise the initiative power regarding that fee.

An alternative analysis of this issue is that nothing in Proposition 218 determines who can use this initiative power. In a sense, Proposition 218 is not self-executing concerning this question. Therefore, the power given to the Legislature by the state constitution to establish the initiative and referendum procedures would be applicable. Article II section 11 provides: "Initiative and referendum powers may be exercised by the electors of each city or county *under procedures that the Legislature shall provide*. This section does not affect a city having a charter." (emphasis added). Under this analysis, the Legislature would have the authority to address this

procedural question and state what voters can exercise this initiative power, except for charter cities. Charter cities themselves would regulate this matter.

An additional legal issue arises where it is concluded only property owners can exercise the Proposition 218 initiative power. This issue involves the constitutional right to equal protection of the law. There may be certain situations where the exercise of the initiative cannot be limited only to property owners because the one-person, one-vote rule established in some equal protection of law cases requires that all voters in the jurisdiction be given the vote. *See Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1969).

This same issue of one-person, one-vote exists regarding the imposing of an assessment or fee as well as the vote on an initiative to reduce or repeal an assessment or fee. The resolution of this issue turns on such matters as whether the agency that imposed the assessment or fee is a city with general governmental powers or a district with only limited powers, and whether the non-property owners denied the vote are as substantially affected and directly interested in the outcome of the vote as are the voting property owners. *See Southern California Rapid Transit District v. Bolen*, 1 Cal. 4th 654, 677, 3 Cal. Rptr. 2d 843 (1992), *reh'g denied* (1992) (approving voting only by property owners on an assessment and rejecting application of the one-person, one-vote rule).

Again, the drafters of Proposition 218 seem to have recognized the possibility this issue could arise regarding assessments because they added section 4 (g) to article XIID. This section provides that, if a court rules that the entire electorate is entitled to vote on the imposition of an assessment, then passage of that assessment will require a two-thirds vote majority, as well as a majority of the property owners.

Limits On Public Agency Communications in Elections

To what extent may cities disseminate information to voters concerning an election on an initiative to repeal a tax?

A city may only distribute facts about the effects of the initiative, and may not spend funds "promoting" opposition to or support of the initiative. The general rule is that a city cannot take sides on an ballot measure. The courts have recognized a distinction between actions by a city that "promote" and actions that merely "educate" the voters. The League of California Cities has prepared a paper describing these limitations and distinctions. *See "Legal Issues Associated With City Participation In Ballot Measure Campaigns,"* July 1996.

In addition, there may be Political Reform Act implications if public agencies spend monies opposing ballot measures. This issue arose in a 1996 ruling by the state Fair Political Practices Commission (FPPC) regarding the County of Sacramento. *See* FPPC No. 93/345. This case involved an election in November 1993 which included state Proposition 172 for a half-cent sales tax for public safety services and a county measure to retain an existing county sales tax and an election in November 1994 which included county measure for the formation of a benefit assessment district for park purposes.

Preceding the 1993 election the county inserted into the county utility bills a two page memorandum prepared by the county executive addressed to members of the public. The insert briefly described the two measures and some dire negative consequences to county services if they failed to pass. There was no counter-argument against passage. Over an eight week period, the insert was sent to 240,000 residents at a cost to the county of \$10,000.

Regarding the assessment measure in the 1994 election, the county hired a consultant to organize the procedures for adoption of the assessment district. Part of the consultant's responsibilities was to prepare a public education program which eventually resulted in distribution of a brochure and video explaining the need for and benefits of creating the district. It contained no argument against the formation of the district. The county counsel advised that an investigation by the FPPC should be expected concerning the brochure and video because of possible "partisan campaigning."

The FPPC took the position that all of these activities by the county constituted expenditures "for political purposes" under Government Code section 82025, which is part of the Political Reform Act of 1974. By having spent more than \$1000 on these activities, the county became a campaign committee which had made "independent" expenditures and was therefore required to file campaign statements under sections 82013(b) and 84203.5. The county obviously had not filed such statements and faced the resulting penalties under the Act.

The dispute was resolved by the county stipulating to a ruling by the FPPC that the county had violated these campaign reporting laws. The county agreed with the FPPC to pay a fine of \$10,000.

V. Legislative Issues

League Legislative Process

A group of city attorneys and others are preparing legislation for submission to the League's board of directors at its January 10-11, 1997 meeting. League staff will then identify a legislative author and arrange for submission of the draft legislation to the Legislative Counsel's office by the January 24, 1997 deadline.

In addition, the Legislative Analyst's Office has arranged several meetings to discuss proposed legislation to clarify and implement Proposition 218. Although representatives of the Howard Jarvis Taxpayers Association, the proponents of the initiative, have stated their view that Proposition 218 is "self-executing," they have indicated a willingness to discuss proposed legislation. They and others have been involved in these meetings.

It is likely that these efforts will produce two bills regarding Proposition 218. One will be restricted to those issues which have broad support and can attain two-thirds approval in both houses of the Legislature. That bill could take effect as an urgency measure and might be in effect prior to the commencement of the 1997-98 fiscal year. Most issues, however, will involve at least some degree of controversy and will be placed in a second, non-urgency bill which can only be effective on January 1, 1998. Therefore, it seems that public agencies will be required to adopt their 1997-98 budgets without much guidance from the Legislature and the courts regarding the effect of Proposition 218.

Topics for Legislative Resolution

General Issues

Some of the more important issues for legislative resolution are these:

S.B. 1590 - *Guardino* retroactivity

This bill addresses the issue of whether the 1995 decision in *Santa Clara County Transportation Authority v. Guardino* retroactively invalidates taxes imposed without voter approval during the time that Proposition 62 was widely viewed as invalid. The bill remains the responsibility of the city attorneys department's standing legislative committee, which Roger Krauel chairs. Roger is city attorney of Coronado, Del Mar and Encinitas.

Tax Issues:

- Definition of "special tax"

Initiative and Referendum Issues:

- Signature requirements
- Prevent potential repeal of bonded/pledged revenue sources
- Identify electorate for initiatives regarding financing districts smaller than the city, county, or special district
- One-year ban on renewal of a failed initiative
- Statement of annual revenue in fiscal impact statement on petitions and in voter pamphlet
- Retain 15 percent signature requirement for special election call

Election Issues:

- Require protests to be cast on official ballot
- Authorize mailed ballot elections
- Clarify authority to provide public education in measure campaigns

Fee Issues:

- Clarify definition of "fee or charge"
- Clarify that a fee is not covered by 218 because it is "property related" with respect to the local government's own property - for example, rental fees for airports, harbors, community centers, etc.
- Clarify that article XIIIID, section 6(a) (majority protest hearing) and (c) (election) are alternative, not cumulative procedures for fees and charges

Assessment Issues:

- Implement and clarify protest rights, including those of renters
- Clarify exemptions for certain existing services (for example, is a storm drain a "sewer"? Does the definition of "street" have the breadth applied to that term for the use of gas tax?)
- Clarify and implement the power to assess other governments
- Clarify whether exemption for certain existing assessments can protect part of an assessment used only partly for qualifying purposes
- Implement Howard Jarvis Taxpayer Association view that an assessment is not "imposed" under Proposition 218 until it is increased
- Clarify that article XIIIID, section 6(b)(5) does not affect the definitions of "general" and "special benefit" so fire assessments may continue, as HJTA's Joel Fox argued during the campaign
- Coordinate protest and levy mechanisms of various assessments with the terms of Proposition 218 and repeal override authority to simplify compliance with the acts
- Define "existing assessment"
- Clarify application of Proposition 218 to assessment district change and modification proceedings
- Clarify scope of relief available in litigation, duty to exhaust, statutes of limitation, etc.

Issues for Other Groups

There are a few issues which would benefit from legislative attention but as to which leadership might be more appropriately provided by other agencies. These include:

- Legislative authority for multi-purpose special districts to propose general taxes for voter approval; and
- Legislative authority for single-purpose districts which currently lack the power to propose special taxes for voter approval, notably certain fire districts.

Questions Likely to Require Judicial Clarification

Implementation of Proposition 218 will be made more difficult by a number of drafting errors and ambiguities in the measure, described in earlier sections of this guide. Assistance from the Legislature in the form of clarifying and authorizing legislation will not resolve all of these issues. Therefore, many of the unknowns will not be resolved without guidance from the appellate courts after years of litigation.

VI. Attachments

This page was intentionally left blank.

PROPOSITION 218
TAXATION--VOTER APPROVAL OF LOCAL TAXES, ETC.--INITIATIVE
CONSTITUTIONAL AMENDMENT

This initiative measure is submitted to the people in accordance with the provisions of Article II, Section 8 of the Constitution.

PROPOSED ADDITION OF ARTICLE XIII C AND ARTICLE XIII D
RIGHT TO VOTE ON TAXES ACT

SECTION 1. TITLE. This act shall be known and may be cited as the "Right to Vote on Taxes Act."

SECTION 2. FINDINGS AND DECLARATIONS. The people of the State of California hereby find and declare that Proposition 13 was intended to provide effective tax relief and to require voter approval of tax increases. However, local governments have subjected taxpayers to excessive tax, assessment, fee and charge increases that not only frustrate the purposes of voter approval for tax increases, but also threaten the economic security of all Californians and the California economy itself. This measure protects taxpayers by limiting the methods by which local governments exact revenue from taxpayers without their consent.

SECTION 3. VOTER APPROVAL FOR LOCAL TAX LEVIES. Article XIII C is added to the California Constitution to read:

CONST Prec. Art. XIII C, § 1

ARTICLE XIII C

SECTION 1. Definitions. As used in this article:

- (a) "General tax" means any tax imposed for general governmental purposes.
- (b) "Local government" means any county, city, city and county, including a charter city or county, any special district, or any other local or regional governmental entity.
- (c) "Special district" means an agency of the state, formed pursuant to general law or a special act, for the local performance of governmental or proprietary functions with limited geographic boundaries including, but not limited to, school districts and redevelopment agencies.
- (d) "Special tax" means any tax imposed for specific purposes, including a tax imposed for specific purposes, which is placed into a general fund.

PROPOSITION 218 - 1

SEC. 2. Local Government Tax Limitation. Notwithstanding any other provision of this Constitution:

(a) All taxes imposed by any local government shall be deemed to be either general taxes or special taxes. Special purpose districts or agencies, including school districts, shall have no power to levy general taxes.

(b) No local government may impose, extend, or increase any general tax unless and until that tax is submitted to the electorate and approved by a majority vote. A general tax shall not be deemed to have been increased if it is imposed at a rate not higher than the maximum rate so approved. The election required by this subdivision shall be consolidated with a regularly scheduled general election for members of the governing body of the local government, except in cases of emergency declared by a unanimous vote of the governing body.

(c) Any general tax imposed, extended, or increased, without voter approval, by any local government on or after January 1, 1995, and prior to the effective date of this article, shall continue to be imposed only if approved by a majority vote of the voters voting in an election on the issue of the imposition, which election shall be held within two years of the effective date of this article and in compliance with subdivision (b).

(d) No local government may impose, extend, or increase any special tax unless and until that tax is submitted to the electorate and approved by a two-thirds vote. A special tax shall not be deemed to have been increased if it is imposed at a rate not higher than the maximum rate so approved.

SEC. 3. Initiative Power for Local Taxes, Assessments, Fees and Charges. Notwithstanding any other provision of this Constitution, including, but not limited to, Sections 8 and 9 of Article II, the initiative power shall not be prohibited or otherwise limited in matters of reducing or repealing any local tax, assessment, fee or charge. The power of initiative to affect local taxes, assessments, fees and charges shall be applicable to all local governments and neither the Legislature nor any local government charter shall impose a signature requirement higher than that applicable to statewide statutory initiatives.

SECTION 4. ASSESSMENT AND PROPERTY RELATED FEE REFORM.

Article XIII D is added to the California Constitution to read:

PROPOSITION 218 - 2

ARTICLE XIII D

SECTION 1. Application. Notwithstanding any other provision of law, the provisions of this article shall apply to all assessments, fees and charges, whether imposed pursuant to state statute or local government charter authority. Nothing in this article or Article XIII C shall be construed to:

- (a) Provide any new authority to any agency to impose a tax, assessment, fee, or charge.
- (b) Affect existing laws relating to the imposition of fees or charges as a condition of property development.
- (c) Affect existing laws relating to the imposition of timber yield taxes.

SEC. 2. Definitions. As used in this article:

- (a) "Agency" means any local government as defined in subdivision (b) of Section 1 of Article XIII C.
- (b) "Assessment" means any levy or charge upon real property by an agency for a special benefit conferred upon the real property. "Assessment" includes, but is not limited to, "special assessment," "benefit assessment," "maintenance assessment" and "special assessment tax."
- (c) "Capital cost" means the cost of acquisition, installation, construction, reconstruction, or replacement of a permanent public improvement by an agency.
- (d) "District" means an area determined by an agency to contain all parcels which will receive a special benefit from a proposed public improvement or property-related service.
- (e) "Fee" or "charge" means any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property related service.
- (f) "Maintenance and operation expenses" means the cost of rent, repair, replacement, rehabilitation, fuel, power, electrical current, care, and supervision necessary to properly operate and maintain a permanent public improvement.
- (g) "Property ownership" shall be deemed to include tenancies of real property where tenants are directly liable to pay the assessment, fee, or charge in question.

PROPOSITION 218 - 3

(h) "Property-related service" means a public service having a direct relationship to property ownership.

(i) "Special benefit" means a particular and distinct benefit over and above general benefits conferred on real property located in the district or to the public at large. General enhancement of property value does not constitute "special benefit."

SEC. 3. Property Taxes, Assessments, Fees and Charges Limited. (a) No tax, assessment, fee, or charge shall be assessed by any agency upon any parcel of property or upon any person as an incident of property ownership except:

- (1) The ad valorem property tax imposed pursuant to Article XIII and Article XIII A.
- (2) Any special tax receiving a two-thirds vote pursuant to Section 4 of Article XIII A.
- (3) Assessments as provided by this article.
- (4) Fees or charges for property related services as provided by this article.

(b) For purposes of this article, fees for the provision of electrical or gas service shall not be deemed charges or fees imposed as an incident of property ownership.

SEC. 4. Procedures and Requirements for All Assessments. (a) An agency which proposes to levy an assessment shall identify all parcels which will have a special benefit conferred upon them and upon which an assessment will be imposed. The proportionate special benefit derived by each identified parcel shall be determined in relationship to the entirety of the capital cost of a public improvement, the maintenance and operation expenses of a public improvement, or the cost of the property related service being provided. No assessment shall be imposed on any parcel which exceeds the reasonable cost of the proportional special benefit conferred on that parcel. Only special benefits are assessable, and an agency shall separate the general benefits from the special benefits conferred on a parcel. Parcels within a district that are owned or used by any agency, the State of California or the United States shall not be exempt from assessment unless the agency can demonstrate by clear and convincing evidence that those publicly owned parcels in fact receive no special benefit.

(b) All assessments shall be supported by a detailed engineer's report prepared by a registered professional engineer certified by the State of California.

PROPOSITION 218 - 4

(c) The amount of the proposed assessment for each identified parcel shall be calculated and the record owner of each parcel shall be given written notice by mail of the proposed assessment, the total amount thereof chargeable to the entire district, the amount chargeable to the owner's particular parcel, the duration of the payments, the reason for the assessment and the basis upon which the amount of the proposed assessment was calculated, together with the date, time, and location of a public hearing on the proposed assessment. Each notice shall also include, in a conspicuous place thereon, a summary of the procedures applicable to the completion, return, and tabulation of the ballots required pursuant to subdivision (d), including a disclosure statement that the existence of a majority protest, as defined in subdivision (e), will result in the assessment not being imposed.

(d) Each notice mailed to owners of identified parcels within the district pursuant to subdivision (c) shall contain a ballot which includes the agency's address for receipt of the ballot once completed by any owner receiving the notice whereby the owner may indicate his or her name, reasonable identification of the parcel, and his or her support or opposition to the proposed assessment.

(e) The agency shall conduct a public hearing upon the proposed assessment not less than 45 days after mailing the notice of the proposed assessment to record owners of each identified parcel. At the public hearing, the agency shall consider all protests against the proposed assessment and tabulate the ballots. The agency shall not impose an assessment if there is a majority protest. A majority protest exists if, upon the conclusion of the hearing, ballots submitted in opposition to the assessment exceed the ballots submitted in favor of the assessment. In tabulating the ballots, the ballots shall be weighted according to the proportional financial obligation of the affected property.

(f) In any legal action contesting the validity of any assessment, the burden shall be on the agency to demonstrate that the property or properties in question receive a special benefit over and above the benefits conferred on the public at large and that the amount of any contested assessment is proportional to, and no greater than, the benefits conferred on the property or properties in question.

(g) Because only special benefits are assessable, electors residing within the district who do not own property within the district shall not be deemed under this Constitution to have been deprived of the right to vote for any assessment. If a court determines that the Constitution of the United States or other federal law requires otherwise, the assessment shall not be imposed unless approved by a two-thirds vote of the electorate in the district in addition to being approved by the property owners as required by subdivision (e).

SEC. 5. Effective Date. Pursuant to subdivision (a) of Section 10 of Article II, the provisions of this article shall become effective the day after the election unless otherwise provided.

PROPOSITION 218 - 5

Beginning July 1, 1997, all existing, new, or increased assessments shall comply with this article. Notwithstanding the foregoing, the following assessments existing on the effective date of this article shall be exempt from the procedures and approval process set forth in Section 4:

(a) Any assessment imposed exclusively to finance the capital costs or maintenance and operation expenses for sidewalks, streets, sewers, water, flood control, drainage systems or vector control. Subsequent increases in such assessments shall be subject to the procedures and approval process set forth in Section 4.

(b) Any assessment imposed pursuant to a petition signed by the persons owning all of the parcels subject to the assessment at the time the assessment is initially imposed. Subsequent increases in such assessments shall be subject to the procedures and approval process set forth in Section 4.

(c) Any assessment the proceeds of which are exclusively used to repay bonded indebtedness of which the failure to pay would violate the Contract Impairment Clause of the Constitution of the United States.

(d) Any assessment which previously received majority voter approval from the voters voting in an election on the issue of the assessment. Subsequent increases in those assessments shall be subject to the procedures and approval process set forth in Section 4.

SEC. 6. Property Related Fees and Charges. (a) Procedures for New or Increased Fees and Charges. An agency shall follow the procedures pursuant to this section in imposing or increasing any fee or charge as defined pursuant to this article; including, but not limited to, the following:

(1) The parcels upon which a fee or charge is proposed for imposition shall be identified. The amount of the fee or charge proposed to be imposed upon each parcel shall be calculated. The agency shall provide written notice by mail of the proposed fee or charge to the record owner of each identified parcel upon which the fee or charge is proposed for imposition, the amount of the fee or charge proposed to be imposed upon each, the basis upon which the amount of the proposed fee or charge was calculated, the reason for the fee or charge, together with the date, time, and location of a public hearing on the proposed fee or charge.

(2) The agency shall conduct a public hearing upon the proposed fee or charge not less than 45 days after mailing the notice of the proposed fee or charge to the record owners of each identified parcel upon which the fee or charge is proposed for imposition. At the public hearing, the agency shall consider all protests against the proposed fee or charge. If written protests against

PROPOSITION 218 - 6

the proposed fee or charge are presented by a majority of owners of the identified parcels, the agency shall not impose the fee or charge.

(b) Requirements for Existing, New or Increased Fees and Charges. A fee or charge shall not be extended, imposed, or increased by any agency unless it meets all of the following requirements:

(1) Revenues derived from the fee or charge shall not exceed the funds required to provide the property related service.

(2) Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed.

(3) The amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel.

(4) No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4.

(5) No fee or charge may be imposed for general governmental services including, but not limited to, police, fire, ambulance or library services, where the service is available to the public at large in substantially the same manner as it is to property owners. Reliance by an agency on any parcel map, including, but not limited to, an assessor's parcel map, may be considered a significant factor in determining whether a fee or charge is imposed as an incident of property ownership for purposes of this article. In any legal action contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this article.

(c) Voter Approval for New or Increased Fees and Charges. Except for fees or charges for sewer, water, and refuse collection services, no property related fee or charge shall be imposed or increased unless and until that fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area. The election shall be conducted not less than 45 days after the public hearing. An agency may adopt procedures similar to those for increases in assessments in the conduct of elections under this subdivision.

(d) Beginning July 1, 1997, all fees or charges shall comply with this section.

SECTION 5. LIBERAL CONSTRUCTION. The provisions of this act shall be liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent.

PROPOSITION 218 - 7

SECTION 6. SEVERABILITY. If any provision of this act, or part thereof, is for any reason held to be invalid or unconstitutional, the remaining sections shall not be affected, but shall remain in full force and effect, and to this end the provisions of this act are severable.

PROPOSITION 218 - 8

Notes

218

Changes in Prop. 218 Implementation
League of California Cities

Proposed to Amend or Repeal the

2018-19 Budgetary Control Act (Prop. 218)

Proposition 218, the Local Government Finance Act, was adopted by the voters in 1993. It established the principle of "no new taxes" and required that any new tax be approved by the voters.

Proposition 218 also established the principle of "no new taxes" and required that any new tax be approved by the voters.

Proposition 218 also established the principle of "no new taxes" and required that any new tax be approved by the voters.

Proposition 218 also established the principle of "no new taxes" and required that any new tax be approved by the voters.

Proposition 218 also established the principle of "no new taxes" and required that any new tax be approved by the voters.

Proposition 218 also established the principle of "no new taxes" and required that any new tax be approved by the voters.

Proposition 218 also established the principle of "no new taxes" and required that any new tax be approved by the voters.

Proposition 218 also established the principle of "no new taxes" and required that any new tax be approved by the voters.

Proposition 218 also established the principle of "no new taxes" and required that any new tax be approved by the voters.

Proposition 218 also established the principle of "no new taxes" and required that any new tax be approved by the voters.

Proposition 218 also established the principle of "no new taxes" and required that any new tax be approved by the voters.

Proposition 218 also established the principle of "no new taxes" and required that any new tax be approved by the voters.

Proposition 218 also established the principle of "no new taxes" and required that any new tax be approved by the voters.

Proposition 218 also established the principle of "no new taxes" and required that any new tax be approved by the voters.

Proposition 218 also established the principle of "no new taxes" and required that any new tax be approved by the voters.

Proposition 218 also established the principle of "no new taxes" and required that any new tax be approved by the voters.

Proposition 218 also established the principle of "no new taxes" and required that any new tax be approved by the voters.

Proposition 218 also established the principle of "no new taxes" and required that any new tax be approved by the voters.

Proposition 218 also established the principle of "no new taxes" and required that any new tax be approved by the voters.

Proposition 218 also established the principle of "no new taxes" and required that any new tax be approved by the voters.

Proposition 218 also established the principle of "no new taxes" and required that any new tax be approved by the voters.

Proposition 218 also established the principle of "no new taxes" and required that any new tax be approved by the voters.

Proposition 218 also established the principle of "no new taxes" and required that any new tax be approved by the voters.

Proposition 218 also established the principle of "no new taxes" and required that any new tax be approved by the voters.

Proposition 218 also established the principle of "no new taxes" and required that any new tax be approved by the voters.

Proposition 218 also established the principle of "no new taxes" and required that any new tax be approved by the voters.

Notes

218

Voter Approval for Local Government Taxes. Limitations on Fees, Assessments, and Charges. Initiative Constitutional Amendment.

Argument in Favor of Proposition 218

VOTE YES ON PROPOSITION 218. IT WILL GIVE YOU THE RIGHT TO VOTE ON TAX INCREASES!

Proposition 218 guarantees your right to vote on local tax increases—even when they are called something else, like “assessments” or “fees” and imposed on homeowners.

Proposition 218 guarantees your right to vote on taxes imposed on your water, gas, electric, and telephone bills.

Proposition 218 does NOT prevent government from raising and spending money for vital services like police, fire and education. If politicians want to raise taxes they need only convince local voters that new taxes are really needed.

Proposition 218 simply extends the long standing constitutional protection against politicians imposing tax increases without voter approval.

After voters passed Proposition 13, politicians created a loophole in the law that allows them to raise taxes without voter approval by calling taxes “assessments” and “fees.”

Once this loophole was created, one lawyer working with politicians wrote, assessments “are now limited only by the limits of human imagination.”

How imaginative can the politicians be with assessments? Here are a few examples among thousands:

- A view tax in Southern California—the better the view of the ocean you have the more you pay.
- In Los Angeles, a proposal for assessments for a \$2-million scoreboard and a \$6-million equestrian center to be paid for by property owners.
- In Northern California, taxpayers 27 miles away from a park are assessed because their property supposedly benefits from that park.
- In the Central Valley, homeowners are assessed to refurbish a college football field.

TAXPAYERS HAVE NO RIGHT TO VOTE ON THESE TAX INCREASES AND OTHERS LIKE THEM UNLESS PROPOSITION 218 PASSES!

Proposition 218 will significantly tighten the kind of benefit assessments that can be levied.

Here are examples of why fees and assessments and other nonvoted taxes are so unfair:

- The poor pay the same assessments as the rich. An elderly widow pays exactly the same on her modest home as a tycoon with a mansion.
- There are now over 5,000 local districts which can impose fees and assessments without the consent of local voters. Special districts have increased assessments by over 2400% over 15 years. Likewise, cities have increased utility taxes 415% and raised benefit assessments 976%, a ten-fold increase.

Non-voted taxes on electricity, gas, water, and telephone services hit renters and homeowners hard.

And, retired homeowners get hit doubly hard!

To confirm the impact of fees and assessments on you, look at your property tax bill. You will see a growing list of assessments imposed without voter approval. The list will grow even longer unless Proposition 218 passes.

Proposition 218 will allow you and your neighbors—not politicians—to decide how high your taxes will be. It will allow those who pay assessments to decide if what they are being asked to pay for is worth the cost.

FOR THE RIGHT TO VOTE ON TAXES, VOTE YES ON PROPOSITION 218.

JOEL FOX
President, Howard Jarvis Taxpayers Association

JIM CONRAN
President, Consumers First

RICHARD GANN
President, Paul Gann's Citizens Committee

Rebuttal to Argument in Favor of Proposition 218

PROPOSITION 218 IS NO FALSE ALARM . . . IT HURTS

Propositions can deceive, so carefully judge who you believe.

Beware of wild claims for new “constitutional rights” and people who pretend concern about widows and orphans.

Read Proposition 218 yourself and see how large corporations, big landowners and foreign interests gain more voting power than YOU.

Promoters say you get “tax reform” . . . you may actually get serious cutbacks in local service and FEWER VOTING RIGHTS for millions of California citizens.

Sometimes we hear hysterical warnings about bad things that never occur . . . Proposition 218 is a REAL threat. On Proposition 218 consider the harm to EXISTING local services, not vague future threats:

- May reduce CURRENT funding for police, fire and emergency medical programs across California.
- Worsens SCHOOL CROWDING by making public schools pay NEW TAXES, cutting classroom teaching.
- Could eliminate LifeLine utility support for SENIORS and disabled citizens.

CONSTITUTIONAL POWER SHIFT.

Proposition 218 etches this into the state Constitution:

- Blocks 3 million Californians from voting on tax assessments. The struggling young couple renting a small home, WILL HAVE NO VOTE on the assessments imposed on the house they rent.
- Grants special land interests more voting power than average homeowners. The “elderly widow” promoters cite will be banned from voting if she is a renter, or her voting power dwarfed by large property owners.
- Gives non-citizens voting rights on your community taxes. Proposition 218 is a great deal for wealthy special interests. But it's a bad deal for the average taxpayer, homeowner and renter.

HOWARD OWENS
Congress of California Seniors

LOIS TINSON
President, California Teachers Association

RON SNIDER
President, California Association of Highway Patrolmen

Voter Approval for Local Government Taxes. Limitations on Fees, Assessments, and Charges. Initiative Constitutional Amendment.

218

Argument Against Proposition 218

PROPOSITION 218 DILUTES VOTING RIGHTS. HURTS LOCAL SERVICES

In the disguise of tax reform, Proposition 218's Constitutional Amendment **REDUCES YOUR VOTING POWER** and gives huge voting power to corporations, foreign interests and wealthy land owners.

It cuts police, fire, library, park, senior, and disabled services and diverts funds needed for classroom-size reductions.

Read Proposition 218 carefully—it's a wolf, not a lamb!

YOU LOSE RIGHTS: CORPORATIONS, DEVELOPERS, NON-CITIZENS GAIN VOTING POWER

Section 4(e) of Proposition 218 changes the Constitution to give corporations, wealthy landowners and developers **MORE VOTING POWER THAN HOMEOWNERS**. It lets large outside interests control community taxes—against the will of local citizens.

EXAMPLE: An oil company owns 1000 acres, you own one acre: the oil corporation gets 1000 times more voting power than you.

While Prop. 218 gives voting power to outside interests, Section 4(g) denies voting rights to more than 3,000,000 California renters.

Reducing American citizens' Constitutional rights, it grants voting rights to corporations and absentee landowners—even foreign citizens.

EXAMPLE: A shopping center owned by a foreign citizen is worth 100 times as much as your home; that person gets 100 times more voting power than you!

Every citizen should have the right to vote if a community is voting on local assessments for police, fire, emergency medical and library programs. It's unfair to give voting power to non-citizens, big landowners and developers, yet deny it to millions of Californians.

MAY CUT LOCAL POLICE, FIRE PROTECTION

Section 6(b)(5) eliminates vital funding sources for local police, fire, emergency medical and library services.

Proposition 218 goes too far—may forbid emergency assessments for earthquakes, floods and fires.

Don't handcuff police and firefighters. The California Police Chiefs Association, Fire Chiefs Association and California Professional Firefighters ask you to vote NO.

The impartial Legislative Analyst's report shows how Proposition 218 could impede LifeLine support for the elderly and disabled. It prohibits seniors and disabled from receiving needed utility services unless they pay all costs themselves.

Proposition 218 cuts more than \$100 million from local services, yet wastes tens of millions each year by changing the Constitution to require 5,000 local elections even if local citizens don't want an election . . . even if the election cost is more than the potential revenue.

MAKES SCHOOL CROWDING WORSE

California teachers oppose Proposition 218 because Section 4(a) imposes a new tax on public school property, diverting millions from classroom programs to pay for non-school expenses.

California already has the most crowded classrooms in America (dead last of 50 states). Proposition 218 makes school crowding worse.

SHELL GAME

This measure takes a few good ideas, but twists and perverts them. It cripples the best local services and puts more power into the hands of special interests and non-citizens.

Proposition 218 goes too far. Assessment laws **DO** need improvement, but Proposition 218 is the wrong way to do it. It does more harm than good, restricting our voting rights, hurting schools, seniors and public safety programs.

Please vote NO on Proposition 218.

FRAN PACKARD

President, League of Women Voters of California

CHIEF RON LOWENBERG

President, California Police Chiefs' Association

CHIEF JEFF BOWMAN

President, California Fire Chiefs' Association

Rebuttal to Argument Against Proposition 218

Arguments against Proposition 218 are misleading and designed to confuse voters. In truth:

1. Proposition 218 expands your voting rights. It **CONSTITUTIONALLY GUARANTEES** your right to vote on taxes.
2. Under Proposition 218, only California registered voters, including renters, can vote in tax elections. Corporations and foreigners get no new rights.
3. Current law already allows property owners, including nonresidents, to act on property assessments based on the assessment amount they pay. This is **NOT** created by Proposition 218.
4. "Lifeline" rates for elderly and disabled for telephone, gas, and electric services are **NOT** affected.
5. Proposition 218 allows voter approved taxes for police, fire, education.

Proposition 218 simply gives taxpayers the right to vote on taxes and stops politicians' end-runs around Proposition 13.

That's why ordinary taxpayers, seniors, parents, homeowners, renters, consumer advocates, support Proposition 218.

Under Proposition 218, officials must convince taxpayers that tax increases are justified. Politicians and special interest groups don't like this idea. But they can't win by saying "taxpayers should not vote on taxes," so they use misleading statements to confuse a simple question.

That question: **DO YOU BELIEVE TAXPAYERS SHOULD HAVE THE RIGHT TO VOTE ON TAXES?** If you answered "yes", **VOTE YES ON PROPOSITION 218.**

Read the nonpartisan, independent **SUMMARY** by the Attorney General, which begins "**VOTER APPROVAL FOR LOCAL GOVERNMENT TAXES.**" And, by all means read your property tax bill, due out now. Then you'll know the truth.

FOR THE RIGHT TO VOTE ON TAXES, VOTE YES ON PROPOSITION 218!

CAROL ROSS EVANS

Vice-President, California Taxpayers Association

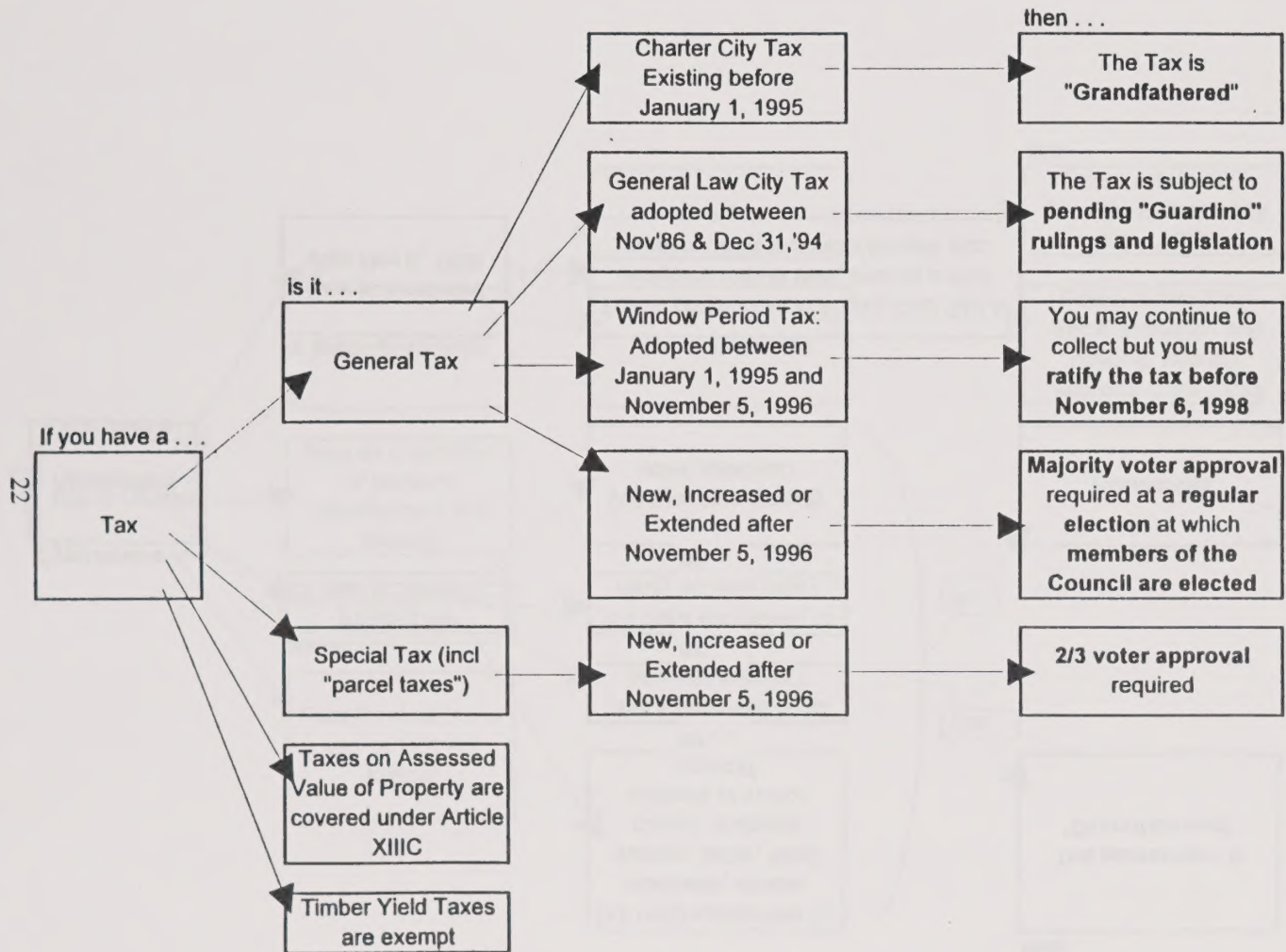
FELICIA ELKINSON

Past President, Council of Sacramento Senior Organizations

LEE PHELPS

Founder, Alliance of California Taxpayers and Involved Voters (ACTIV)

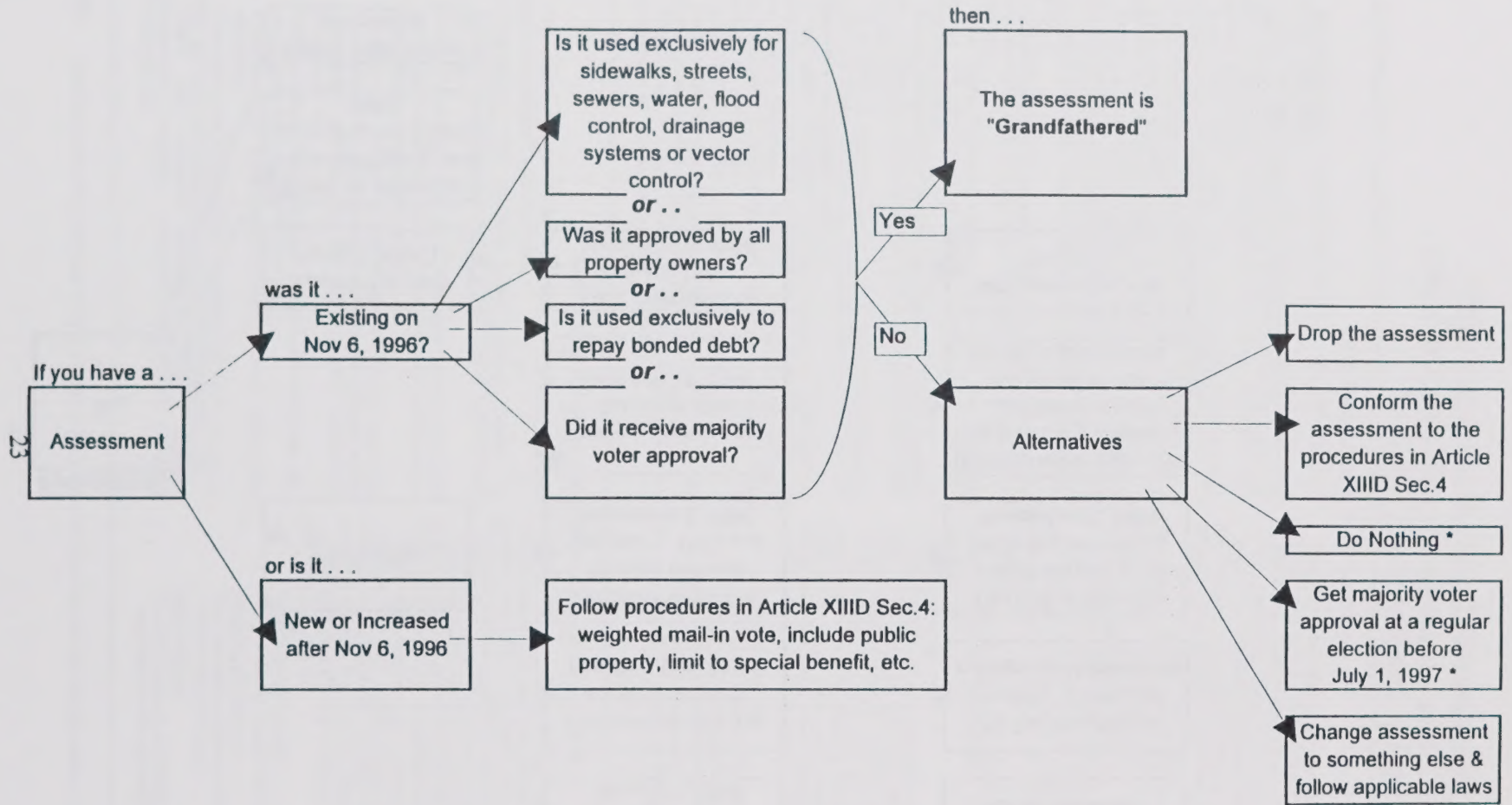
How to Comply With Prop 218



League of California Cities

Prepared by Michael Coleman (mcoleman@dcn.davis.ca.us)

How to Comply With Prop 218



* Legal interpretations differ



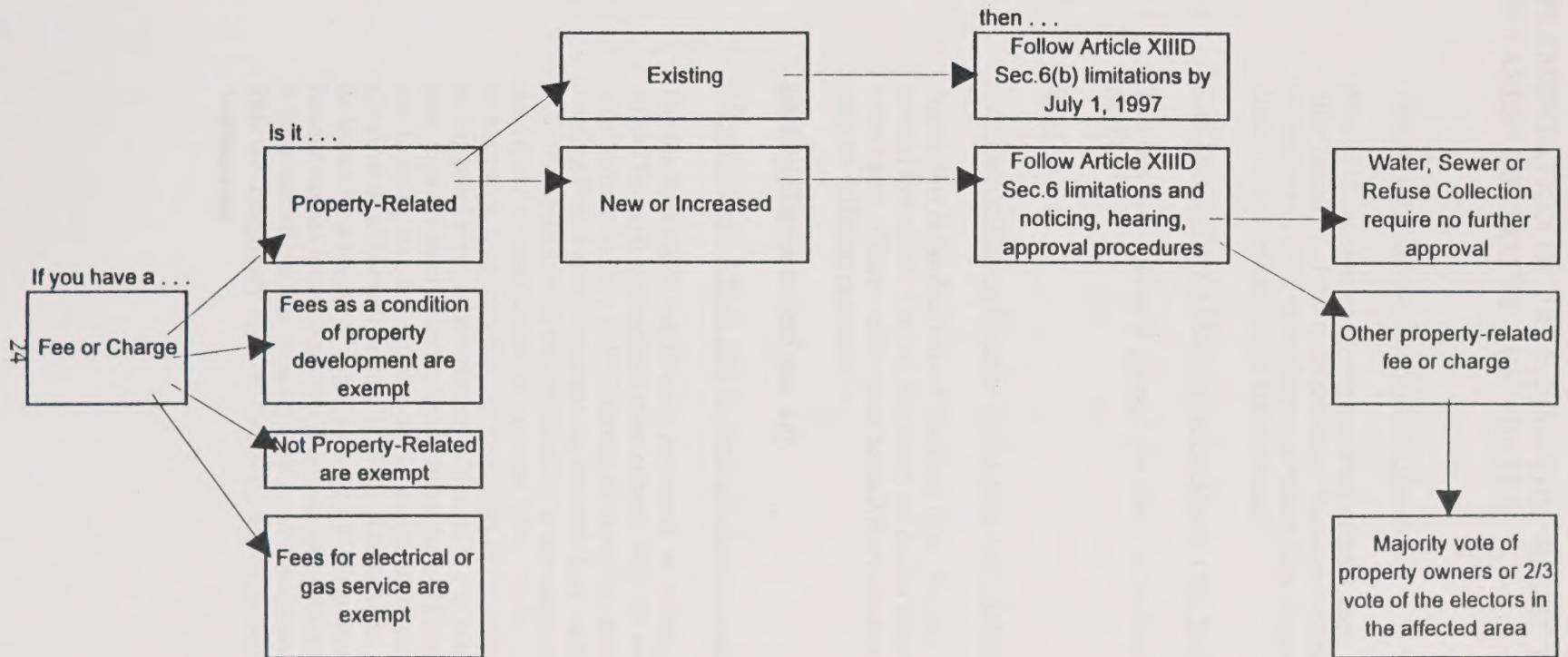
League of California Cities

Prepared by Michael Coleman (mcoleman@dcn.davis.ca.us)

November 20, 1996

Page 2 of 3

How to Comply With Prop 218



This page was intentionally left blank.

THE IMPLEMENTATION OF PROP. 218 -- THE "RIGHT TO VOTE ON TAXES" INITIATIVE -- KEY DATES

January 1, 1995

Charter City General Tax Window Opens

Prop. 218 requires non-voter approved general taxes adopted after January 1, 1995 to be presented for voter ratification by November 6, 1998 at an election in which City Council or Board of Supervisors seats are contested.

December 6, 1996

Last Date to Place a Measure on the March 1997 Ballot

This deadline applies to general law cities under Elections Code Section 9225.

March 4, 1997

Election Day

March 7, 1997

Last Date to Place a Measure on the June 1997 Ballot

Again, this is the deadline of Elections Code Section 9225 for general law cities. County Registrars set earlier deadlines in some cases. Charter cities must consult their charters, which may set different requirements.

June 3, 1997

Election Day

July 1, 1997

Effective Date of Prop. 218 for Fees and Assessments

The measure states that all new, increased, or existing property-related fees and assessments must comply with the measure's requirements by July 1, 1997 unless an exception applies. As to existing fees, a good argument can be made that the provisions of the measure are not triggered until it is necessary to adopt a fee, repeal a sunset clause, or increase a fee. As to assessments, it appears that the provisions of the measure will be triggered when an assessment is "levied." For many assessment districts, such as those under the 1972 Landscaping and Lighting Act, assessments are levied annually and the effective deadline will be July 1, 1997. Assessments can also be levied for a period of years, as is typical when assessments finance capital improvements. These assessments may not need to be modified until an existing multi-year assessment expires. This will commonly apply to Fire Suppression Benefit Assessments.

RICHARDS, WATSON
& GERSHON
Attorneys at Law

August 8, 1997Last Date to Place a Measure on the November 1997 Ballot

Again, this is the deadline of Elections Code Section 9225 for general law cities. County Registrars may set earlier deadlines and charter cities should consult their charters.

November 4, 1997Election DayNovember 6, 1998Deadline to Validate "Window-Period" Taxes

General taxes adopted without a vote of the people between January 1, 1995 and November 6, 1995 must be validated at the polls by November 6, 1998

2Expiration of Exception for Bonded Assessments and Fees

Revenue streams which have been formally pledged to repay bonds or other debt are protected from the requirements of Prop. 218 by the Contracts Clause of the federal Constitution. This protection expires when the debt is paid off.

RICHARDS, WATSON
& GERSHON
Attorneys at Law

HOWARD JARVIS
TAXPAYERS
ASSOCIATION



HOWARD JARVIS, Founder (1903-1986)

ESTELLE JARVIS, Honorary Chairwoman

JOEL FOX, President

TREVOR GRIMM, General Counsel

JONATHAN M. COUPAL, Director of Legal Affairs

December 6, 1996

Joanne Spears
LEAGUE OF CALIFORNIA CITIES
1400 K Street
Sacramento, CA 95814

Dear Ms. Spears:

Pursuant to your request, enclosed is a copy of the Annotated version of Proposition 218. If you have questions after reviewing this document, please do not hesitate to call. Thank you.

Sincerely,

Jonathan M. Coupal
Director of Legal Affairs

Enclosure

RIGHT TO VOTE ON TAXES ACT (PROPOSITION 218)

[ANNOTATED AS OF SEPTEMBER 5, 1996]

SECTION 1. TITLE. This Act shall be known and may be cited as the Right to Vote on Taxes Act.

[Annotation: The title reflects the unifying theme -- there are three main elements of the initiative and each relates to voter and taxpayer control over local taxes]

SECTION 2. FINDINGS AND DECLARATIONS. The People of the State of California hereby find and declare that Proposition 13 was intended to provide effective tax relief and to require voter approval of tax increases. However, local governments have subjected taxpayers to excessive tax, assessment, fee and charge increases that not only frustrate the purposes of voter approval for tax increases, but also threaten the economic security of all Californians and the California economy itself. This measure protects taxpayers by limiting the methods by which local governments exact revenue from taxpayers without their consent.

[Annotation: Findings specifically refer to Proposition 13. If local governments and courts had not abused the letter and spirit of 13, this initiative would not be necessary. Again, focus is on voter and taxpayer control]

SECTION 3. VOTER APPROVAL FOR LOCAL TAX LEVIES. Article XIIC of the California Constitution is hereby added:

[Annotation: This section constitutionalizes Proposition 62, Government Code Section 53720, et seq. Although Proposition 62 was upheld by the California Supreme Court in Santa Clara County Local Transportation Authority v. Guardino (Howard Jarvis Taxpayers Association, et al., Real Parties in Interest (1995) 11 cal.4th 220, that initiative was a statutory initiative and its applicability to charter cities has been called into question. If Proposition 218 passes, there will be no question that all the voter approval requirements will apply to charter cities. As noted below, this section also makes Proposition 62 stronger in its application.]

SEC. 1. Definitions.

As used in this Article:

- (a) "General tax" means any tax imposed for general governmental purposes.
- (b) "Local government" means any county, city, city and county, including a charter city or county, any special district, or any other local or regional governmental entity.

Right to Vote on Taxes Act

Page 2

[Annotation: Regional governments were included to ensure that provisions of Act apply to all governmental entities other than the state itself.]

- (c) "Special District" means an agency of the state, formed pursuant to general law or special act, for the local performance of governmental or proprietary functions with limited geographic boundaries including, but not limited to, school districts and redevelopment agencies.

[Annotation: Even more expansive definition than Proposition 62. No government, except the state itself, is exempt]

- (d) "Special tax" means any tax imposed for specific purposes including taxes imposed for specific purposes which are placed into a general fund.

[Annotation: This reinforces language of Rider v. San Diego dealing with special taxes. The key is the purpose of the funding, not the name of the bank account. A number of analyses of Proposition 218 prepared by local governments have stated that the revised transportation tax in Santa Clara County (proposing "dual" measures on the ballot) would be illegal under this definition.]

SEC. 2. Local Government Tax Limitation.

Notwithstanding any other provision of this Constitution:

- (a) All taxes imposed by any local government shall be deemed to be either general taxes or special taxes. Special purpose districts or agencies, including school districts, shall have no power to levy general taxes.

[Annotation: This provision merely reflects language of Supreme Court in the Rider v. San Diego decision saying special districts, by their special nature, have no power to levy general taxes.]

- (b) No local government may impose, extend or increase any general tax unless and until such tax is submitted to the electorate and approved by a majority vote. A general tax shall not be deemed to have been increased if it is imposed at a rate not higher than the maximum rate so approved. The election required by this subdivision shall be consolidated with a regularly scheduled general election for members of the governing body of the local government except in cases of emergency declared by a unanimous vote of the governing body.

Right to Vote on Taxes Act

Page 3

[Annotation: Similar to provision in Proposition 62 with one clarification -- the ballot language could incorporate future increases and if the ballot measure is approved, then the government would not have to go back to the voters for those increases. As long as the government wants to levy now but could raise to the voter approved level at some later time. Also, elections are consolidated with elections at which members of governing body are elected, except in cases of emergency. Note that a unanimous vote is needed to declare an emergency but this has always been interpreted as a unanimous vote of those present. The concern is that the nature of the emergency might keep some members from attending a meeting.]

- (c) Any general tax imposed, extended or increased, without voter approval, by any local government on or after January 1, 1995, and prior to the effective date of this Article, shall continue to be imposed only if approved by a majority vote of the voters voting in an election on the issue of the imposition, which election shall be held within two years of the effective date of this Article and in compliance with subdivision (b) of this section.

[Annotation: Effective date of January 1, 1995 was necessary to prevent a "rush" of new taxes to meet what would otherwise be an effective date of November, 1996. In any event, this provision is not draconian for local governments which have been complying with the requirements of Proposition 62.]

- (d) No local government may impose, extend or increase any special tax unless and until such tax is submitted to the electorate and approved by a two-thirds vote. A special tax shall not be deemed to have been increased if it is imposed at a rate not higher than the maximum rate so approved.

SEC. 3. Initiative Power For Local Taxes, Assessments, Fees and Charges.

Notwithstanding any other provision of this Constitution, including, but not limited to, Article II, Sections 8 and 9, the initiative power shall not be prohibited or otherwise limited in matters of reducing or repealing any local tax, assessment, fee or charge. The power of initiative to affect local taxes, assessments, fees and charges shall be applicable to all local governments and neither the legislature nor any local government charter shall impose a signature requirement higher than that applicable to statewide statutory initiatives.

[Annotation: This section merely "constitutionalizes" Rossi v. Brown, a recent decision of the California Supreme Court upholding the right of the electorate to use the local

Right to Vote on Taxes Act
Page 4

initiative power to reduce or eliminate government imposed levies via the initiative power. It provides a "last resort" remedy.]

SECTION 4. ASSESSMENT AND PROPERTY RELATED FEE REFORM.

[Annotation: This is the third major element of Proposition 218.]

Article XIID of the California Constitution is hereby added:

SEC. 1. Application.

Notwithstanding any other provision of law, the provisions of this Article shall apply to all assessments, fees and charges whether imposed pursuant to state statute or local government charter authority. Nothing in this Article or Article XIIC shall be construed to:

- (a) provide any new authority to any agency to impose a tax, assessment, fee or charge;
- (b) affect existing laws relating to the imposition of fees or charges as a condition of property development;

[Annotation: the purpose of this provision is to leave unaffected any existing law relating to developer fees. Although there have been abuses in this area by local governments (resulting in substantially increased housing costs), the focus of Proposition 218 is on those levies imposed simply by virtue of property ownership. Developer fees, in contrast, are imposed as an incident of the voluntary act of development. Moreover, neither this section nor other provisions of Proposition 218 would impair the ability of developers to employ "land secured financing" as a means to finance infrastructure.] or;

- (c) affect existing laws relating to the imposition of timber yield taxes.

[These taxes are already addressed in the California Constitution and by legislation. The intent of Proposition 218 was to leave this entire area of law unaffected.]

SEC. 2. Definitions.

As used in this article:

- (a) "Agency" means any local government as defined in Article XIIC,

Right to Vote on Taxes Act
Page 5

Section 1(b).

- (b) "Assessment" means any levy or charge upon real property by an agency for a special benefit conferred upon the real property. "Assessment" includes, but is not limited to, "special assessment," "benefit assessment," "maintenance assessment" and "special assessment tax."
- (c) "Capital cost" means the cost of acquisition, installation, construction, reconstruction or replacement of a permanent public improvement by an agency.
- (d) "District" means an area determined by an agency to contain all parcels which will receive a special benefit from a proposed public improvement or property-related service.
- (e) "Fee" or "charge" means any levy other than an ad valorem tax, a special tax or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including user fees or charges for a property related service.

[Annotation: definition of fees, for purposes of this article, are limited to fees imposed as an incident of property ownership. DMV fees, statewide fees, fines, and recreation fees such as gate fees, are not affected]

- (f) "Maintenance and operation expenses" means the cost of rent, repair, replacement, rehabilitation, fuel, power, electrical current, care, and supervision necessary to properly operate and maintain a permanent public improvement.
- (g) "Property ownership" shall be deemed to include tenancies of real property where tenants are directly liable to pay the assessment, fee, or charge in question.

[Annotation: Under this definition, if a tenant of real property is directly liable to pay an assessment, they would have the right to protest and vote. This will depend on the terms of the lease. "Direct pass throughs" are more common in commercial leases as opposed to residential leases.]

- (h) "Property-related service" means a public service having a direct relationship to property ownership.

Right to Vote on Taxes Act

Page 6

- (l) "Special benefit" means a particular and distinct benefit over and above general benefits conferred on real property located in the district or to the public at large. General enhancement of property value does not constitute "special benefit."

SEC. 3. Property Taxes, Assessments, Fees and Charges Limited.

[Annotation: This section provides an exclusive list of those levies which can be imposed on property]

- (a) No tax, assessment, fee or charge shall be assessed by any agency upon any parcel of property or upon any person as an incident of property ownership except:
 - (1) The ad valorem property tax imposed pursuant to Article XIII and Article XIII A of this Constitution.
 - (2) Any special tax receiving a two-thirds vote pursuant to Article XIII A, Section 4 of this Constitution.

[Annotation: Proposition 218 permits special taxes with a two-thirds vote consistent with Proposition 13. Although there remain significant policy issues with respect to any non-ad valorem property tax, the authors of Proposition 218 realized it would be difficult to repeal existing statutory authorization for special taxes on property as long as those taxes secured the requisite two-thirds vote.]

- (3) Assessments as provided by this Article.
 - (4) Fees or charges for property related services as provided by this Article.
- (b) For purposes of this Article, fees for the provision of electrical or gas service shall not be deemed charges or fees imposed as an incident of property ownership.

[Annotation: Such services, even when provided by a public entity, are usually metered and, therefore, probably meet the "cost of service" requirements of this initiative. Therefore, they were exempted from application.]

SEC. 4. Procedures and Requirements for All Assessments.

Right to Vote on Taxes Act
Page 7

- (a) An agency which proposes to levy an assessment shall identify all parcels which will have a special benefit conferred upon them and upon which an assessment will be imposed. The proportionate special benefit derived by each identified parcel shall be determined in relationship to the entirety of the capital cost of a public improvement or the maintenance and operation expenses of a public improvement or for the cost of the property related service being provided. No assessment shall be imposed on any parcel which exceeds the reasonable cost of the proportional special benefit conferred on that parcel. Only special benefits are assessable, and an agency must separate the general benefits from the special benefits conferred on a parcel. Parcels within a district that are owned or used by any agency, the State of California or the United States shall not be exempt from assessment unless the agency can demonstrate by clear and convincing evidence that such publicly owned parcels in fact receive no special benefit.

[Annotation: These new requirements for assessments are actually similar to those imposed by traditional assessment law. The overall purpose of this section is to permit assessments to be used, once again, as a legitimate financing mechanism and not just a means to impose flat rate parcel taxes. These requirements are: assessments must be proportional to the benefit; only special benefits are assessable; and public properties must pay their fair share. Historically, public properties were also assessed benefit assessments. (See, e.g., Municipal Improvement Act of 1911). Only in recent years when assessments have been used to impose what are, in effect, parcel taxes, have public properties received blanket exemptions from assessments. Under Proposition 218, if public property is benefited the same as private property, then it should also be assessed.]

- (b) All assessments must be supported by a detailed engineer's report prepared by a registered professional engineer certified by the State of California.

[Annotation: This requirement is consistent with traditional assessment law. Only since Proposition 13 have non-engineers been able to prepare "engineers' reports."]

- (c) The amount of the proposed assessment for each identified parcel shall be calculated and the record owner of each parcel shall be given written notice by mail of the proposed assessment, the total amount thereof chargeable to the entire district, the amount chargeable to the owner's particular parcel, the duration of such

Right to Vote on Taxes Act

Page 8

payments, the reason for such assessment and the basis upon which the amount of the proposed assessment was calculated, together with the date, time, and location of a public hearing on the proposed assessment. Each notice shall also include, in a conspicuous place thereon, a summary of the procedures applicable to the completion, return and tabulation of the ballots required pursuant to subdivision (d), including a disclosure statement that the existence of a majority protest, as defined in subdivision (e), will result in the assessment not being imposed.

[Annotation: Notice requirements for assessments have been substantially liberalized in recent years. Proposition 218 would require mailed notice, not just publication in a newspaper. Mailed notice would also include a ballot for to be returned by the property owners]

- (d) Each such notice mailed to owners of identified parcels within the district shall contain a ballot which includes the agency's address for receipt of any such ballot once completed by any owner receiving such notice whereby each such owner may indicate his or her name, reasonable identification of the parcel and support or opposition to the proposed assessment.
- (e) The agency shall conduct a public hearing upon the proposed assessment not less than 45 days after mailing the notice of the proposed assessment to record owners of each identified parcel. At the public hearing, the agency shall consider all protests against the proposed assessment and tabulate the ballots. The agency shall not impose an assessment if there is a majority protest. A majority protest exists if, upon the conclusion of the hearing, ballots submitted in opposition to the assessment exceed the ballots submitted in favor of the assessment. In tabulating the ballots, the ballots shall be weighted according to the proportional financial obligation of the affected property.

[Annotation: Under Proposition 218, assessments may not be imposed without majority approval of property owners. Ballots are weighted according to financial obligation. Several existing statutes call for the "weighting" of votes so this does not represent a significant change in the law. In any event, this is consistent with policy of permitting those financially obligated to pay to impact the decision of whether the levy is imposed. Moreover, under existing law, the failure to file a protest counts as a "yes" vote. This changes the current methodology by subjecting the levy to a simple majority vote of those property owners who return ballots.]

Right to Vote on Taxes Act
Page 9

- (f) In any legal action contesting the validity of any assessment, the burden shall be on the agency to demonstrate that the property or properties in question receive a special benefit over and above the benefits conferred on the public at large and that the amount of any contested assessment is proportional to, and no greater than, the benefits conferred on the property or properties in question.

[Annotation: Although this provision shifts burden of proof in taxpayers' favor on issue of benefits to property, it is consistent with some current case law. See, e.g., Beaumont Investors v. Beaumont-Cherry Water Dist. (1985) 165 Cal.App.3d 567.]

- (g) Because only special benefits are assessable, electors residing within the district who do not own property within the district shall not be deemed under this Constitution to have been deprived of the right to vote for any assessment. If a court determines that the Constitution of the United States or other federal law requires otherwise, the assessment shall not be imposed unless approved by a two-thirds vote of the electorate in the district in addition to being approved by the property owners as required by Section 4(e).

[Annotation: Under existing law, it is not a violation of the right to vote to limit elections to property owners if the district provides only a narrow, property related service. So, Cal. Rapid Transit District v. Bolen (1992) 1 Cal.4th 654. However, in the unlikely event this becomes an issue, this provision would simply require an additional vote of the registered voters to impose the assessment.]

SEC. 5. Effective Date

[Annotation: Although titled "effective date," this section has some important exceptions regarding the requirements for assessments. If one of the following exceptions does not apply, then an existing assessments must cease by July 1, 1997 unless ratified by the property owners]

Pursuant to Article II, Section 10(a), the provisions of this Article shall become effective the day after the election unless otherwise provided. Beginning July 1, 1997, all existing, new or increased assessments shall comply with this Article. Notwithstanding the foregoing, the following assessments existing on the effective date of this Article shall be exempt from the procedures and

Right to Vote on Taxes Act
Page 10

approval process set forth in Section 4:

[Annotation: An assessment is deemed "existing on the effective date of this Article," even if it is the type of assessment which comes up for annual renewal. As long as the assessment rates and methodology remained the same from year to year, the fact that the assessment is "imposed" annually would not necessarily trigger applicability of the requirements of this Article. This would be true even if the total revenue to the district increased due to changes in land use for specific parcels (e.g., newly-created or improved parcels). Again, as long as the assessment rates and methodology remain the same, an increase in revenue as the result of land use changes would not trigger applicability of Section 4. However, the procedures and approval process of Section 4 would apply to the entire assessment in the event the assessments were increased either by the rate of assessment or by a change in methodology].

- (a) any assessment imposed exclusively to finance the capital costs or maintenance and operation expenses for sidewalks, streets, sewers, water, flood control, drainage systems or vector control. Subsequent increases in such assessments shall be subject to the procedures and approval process set forth in Section 4;

[Annotation: This is the "traditional purposes" exception. These existing assessments do not need property owner approval to continue. However, future assessments for these traditional purposes are covered.]

- (b) any assessment imposed pursuant to a petition signed by the persons owning all of the parcels subject to the assessment at the time the assessment is initially imposed. Subsequent increases in such assessments shall be subject to the procedures and approval process set forth in Section 4;

[Annotation: This provision exempts land secured financing arrangements used by developers. This does not concern us because increased tax liability is capitalized into the purchase price]

- (c) any assessment the proceeds of which are exclusively used to repay bonded indebtedness of which the failure to pay would violate the Contract Impairment Clause of the Constitution of the United States of America;

[Annotation: Even an amendment to the California Constitution cannot impair a contract protected by the federal constitution. However, this exception can only be

Right to Vote on Taxes Act
Page 11

used for bonds that are actually protected by the impairment clause. Certificates of Participation and other creative debt instruments would not be protected.] or,

- (d) any assessment which previously received majority voter approval from the voters voting in an election on the issue of the assessment. Subsequent increases in such assessments shall be subject to the procedures and approval process set forth in Section 4.

[Annotation: Although the exception for assessments previously approved by the voters will permit the continued collection of some particularly illegitimate assessments, requiring an additional approval process would be redundant]

SEC. 6. Property Related Fees and Charges.

[Annotation: The purpose of this section is to prevent the exploitation of "fees" as a means to avoid the new restrictions on assessments. Because flat rate parcel taxes have avoided the strictures of Proposition 13 simply by being called "assessments," the drafters are concerned that the same will happen with "fees" – that is, circumventing taxpayer protections by manipulating the label of the levy.]

- (a) **Procedures for New or Increased Fees and Charges.** An agency shall follow the procedures pursuant to this section in imposing or increasing any fee or charge as defined pursuant to this Article including, but not limited to, the following:
 - (1) The parcels upon which a fee or charge is proposed for imposition shall be identified. The amount of the fee or charge proposed to be imposed upon each parcel shall be calculated. The agency shall provide written notice by mail of the proposed fee or charge to the record owner of each identified parcel upon which the fee or charge is proposed for imposition, the amount of the fee or charge proposed to be imposed upon each, the basis upon which the amount of the proposed fee or charge was calculated, the reason for the fee or charge, together with the date, time, and location of a public hearing on the proposed fee or charge.

[Annotation: This section is applicable to any fee imposed on a parcel basis or for fees which provide a property related service. It does not affect fees that are not property related such as DMV fees, park fees, or administrative charges imposed by a local government.]

Right to Vote on Taxes Act
Page 12

- (2) The agency shall conduct a public hearing upon the proposed fee or charge not less than 45 days after mailing the notice of the proposed fee or charge to the record owners of each identified parcel upon which the fee or charge is proposed for imposition. At the public hearing, the agency shall consider all protests against the proposed fee or charge. If written protests against the proposed fee or charge are presented by a majority of owners of the identified parcels, the agency shall not impose the fee or charge.

[Annotation: Votes on property fees are not weighted in the same manner as assessments because to do so would be administratively costly. A simple majority of fee payers can stop a fee proposal.]

- (b) **Requirements for Existing, New or Increased Fees and Charges.** A fee or charge shall not be extended, imposed or increased by any agency unless it meets all of the following requirements:

[Annotation: These five requirements are applicable to all fees, including those that currently exist. In essence, these requirements mandate that fees not exceed the "cost of service."]

- (1) Revenues derived from the fee or charge shall not exceed the funds required to provide the property related service.
- (2) Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed.

[Annotation: Requirements 1 & 2 will prohibit a current practice of siphoning off fee revenue to supplement a city's general fund. This currently occurs both in Los Angeles and Sacramento.]

- (3) The amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel.

[Annotation: Under the initiative, fees, just like assessments, must be proportional.]

- (4) No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether

Right to Vote on Taxes Act
Page 13

characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4 of this Article.

[Annotation: Requires standby charges to go through assessment procedures. If a current standby charge is in the nature of an assessment, it may take advantage of the current exemptions for assessments. If not, the levy would have to be reimposed as an assessment and meet all requirements of Section 5 or cease to be collected.]

- (5) No fee or charge may be imposed for general governmental services including, but not limited to, police, fire, ambulance or library services where the service is available to the public at large in substantially the same manner as it is to property owners.

[Annotation: This would prohibit the imposition of parcel "charges" for general governmental services. The purpose of this provision is to reverse those levies, such as the County of Los Angeles' parcel "charge" for library services irrespective of use of library services.]

Reliance by an agency on any parcel map including, but not limited to, an assessor's parcel map, may be considered a significant factor in determining whether a fee or charge is imposed as incident of property ownership for purposes of this Article. In any legal action contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this Article.

- (c) **Voter Approval for New or Increased Fees and Charges.** Except for fees or charges for sewer, water, and refuse collection services, no property related fee or charge shall be imposed or increased unless and until such fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area. The election shall be conducted not less than 45 days after the public hearing. An agency may adopt procedures similar to those for increases in assessments in the conduct of elections under this subdivision.

[Annotation: Exemption for sewer, water and refuse collection is for voter approval only. Such fees still must meet all of the five substantive requirements of paragraph (b). Exemption is based on philosophy of attempting to reverse the end-runs around Proposition 13. Since water, sewer and refuse collection fees pre-date proposition 13, they were exempted from voter approval]

Right to Vote on Taxes Act
Page 14

- (d) Beginning July 1, 1997, all fees or charges shall comply with this Section.

SECTION 5. LIBERAL CONSTRUCTION. The provisions of this Act shall be liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent.

[Annotation: Purpose of this section is to ensure that, in the event of any ambiguity, that the rights of taxpayers will be paramount.]

SECTION 6. SEVERABILITY. If any provision of this Act, or part thereof, is for any reason held to be invalid or unconstitutional, the remaining sections shall not be affected, but shall remain in full force and effect, and to this end the provisions of this Act are severable.

[Annotation: Standard severability clause.]

This page was intentionally left blank.



Moody's Investors Service Public Finance

One Sansome Street
Suite 3100
San Francisco, CA 94104

California Approves Proposition 218

November 13, 1996

Comment

Grants Wider Taxpayer Input on Taxes, Assessments and Fees, and Raises a Number of Credit Concerns

Last week, voters in California adopted Proposition 218, a constitutional amendment whose stated purpose was to grant wider taxpayer input in matters of taxation, assessments, and fees. The breadth of the amendment's provisions raises numerous credit concerns and, eventually, many ratings are likely to be negatively affected. But the measure's complexity and ambiguity make it difficult to reach firm conclusions so soon after its passage. Perhaps its greatest impact on the municipal market will be the shadow of doubt it now casts.

Proposition 218's Most Obvious Impact will be on City and County General Fund Debt

Cities and counties will certainly face new budget pressures, most immediately those that face the possible loss of certain existing taxes and assessments beginning July 1, 1997. This pressure will have a negative impact on the credit quality of any debt tied to these issuers' general funds: their general obligation, lease-secured, and pension obligation debt. It is impossible to determine at this time, however, which specific ratings will be affected. The full impact of the new fiscal restrictions will not manifest itself for years, most likely during a future recession.

Revenue bonds are less clearly affected by Proposition 218. The fees and charges securing water, sewer, and solid waste debt will now be subject to new approval procedures. The measure may also establish new standards which these fees and charges must meet. These changes could restrict local governments' ability to maintain the levels of coverage on which many revenue bond ratings depend and could even prevent them from meeting rate covenants.

Because school district funding options were already limited, most districts will be relatively unaffected by

Proposition 218's passage. The handful of schools that have imposed landscaping assessments to finance their playing fields, however, will likely find a new hole in their revenue structures, unless such measures had obtained prior voter approval.

Other types of debt should remain untouched. Tax allocation bonds are clearly outside of the scope of the measure. Bonds secured directly by assessments are not threatened, but they will probably be issued less frequently going forward. Mello-Roos bonds appear safe, but could be affected by the amendment's broad language regarding voters' rights to repeal taxes.

Indeed, embedded in Proposition 218 are a number of potential legal land mines like the voters' rights to repeal taxes. Over the long term, an adverse judicial interpretation may reveal one of these provisions to be the most significant result of the proposition. At a minimum, passage has exposed public finance law in California to the risk of new judicial surprises for years to come.

The Measure's Scope

Proponents of "The Taxpayers' Right to Vote Act" had three main goals.

- The first was to constitutionalize the state supreme court's decision regarding Proposition 62 in *Guardino v. Santa Clara*. Proposition 62 established a majority-voter approval requirement for general purpose taxes. Because the proposition was a statutory initiative, it did not apply to charter cities, whose powers have certain constitutional protections. Proposition 218 amended Article XIII of the state constitution to settle the question. All taxes will now require voter

November 13, 1996

California Approves Proposition 218

approval. Several other judicial rulings are also now incorporated in the constitution, including the power of voters to repeal taxes through a referendum.

- The second target of Proposition 218 was assessments. Reacting to the broadened use of this tool to finance services after Proposition 13 had limited taxation, the measure adds several new requirements to the levying of benefit assessments. The most significant change is in the approval process. Previously, an assessment could be imposed following public notice and a hearing if less than a majority of those affected chose to formally protest the proceedings. Proposition 218 redefines the majority protest process to resemble a vote. Ballots are mailed to property owners along with their notice, and a majority of them must now approve the measure, shifting the procedural advantage to the opponents of an assessment. The measure also states that only special benefits can be financed with assessments; a similar standard was previously established in case law. In addition, the measure redefines the legal standard by which any challenge to an assessment will be judged. Rather than the historical judicial deference to legislative decisions, the burden of proof of the validity of the proceedings now is borne by the public agency. This particular finding, also made in relation to fees, would seem to encourage increased legal challenges within the statutory time limits.
- The third general area governed by the measure is "property-related fees and charges." The new requirements in these areas appear targeted at both utility fees (for all services other than electricity or gas) and for a variety of other charges that occasionally appear on a property tax bill. Some charges on property, such as for library or police services, are eliminated outright unless they provide a level of service not available to the public at large. New charges or increasing current charges for water, sewer and refuse collection, if found to be "property-related fees or charges" under the terms of the proposition, will be subject to a new public process similar to the pre-existing law for assessments. Such fees will now require public notice, hearing, and termination of the process if a written majority protest occurs. New charges other

than for water, sewer and refuse collection, will require some form of voter approval (simple majority if approved by property owners, two-thirds if approved by electors). The measure also requires that fees and charges reflect the cost of service. The requirement is similar to a requirement, added to the state constitution in 1979 by Proposition 4, which created the "Gann Limit" on appropriations. Under its provisions, fees and charges must meet a cost-of-service test to avoid being subject to the appropriation limit established for taxes and other general revenues.

Cities and Counties Will Feel the Pressure First
Proposition 218 will restrict general fund revenues directly and indirectly in several ways. The consequences of Proposition 218 will be felt most immediately by those cities and counties whose revenue structures currently rely on special assessments or certain fees to finance services. Although certain existing maintenance assessments have been grandfathered, including street and sidewalk maintenance and flood control, increases in assessments for these limited purposes, and the continuation of all other existing assessments, will require approval under the new procedures.

Probably the largest dollar volume of revenues threatened by the risks of reapproval come from street lighting assessments. Other common assessments that must be submitted to the modified vote/majority protest procedure this fiscal year for extension beyond July 1, 1997 are fire suppression and landscaping assessments. Unless reauthorized by property owners, cities and counties will need to reduce services or reallocate existing revenues. As discussed, certain fees imposed on property, such as for basic library and police services, are banned outright. Cities and counties that relied on such fees will also have to make budget adjustments.

Going forward, all new and re-approved assessments must meet the various tests of the new law. One of these is that an agency must separate the general benefits from the special benefits conferred on a parcel. If this is eventually interpreted as a new standard, then cities and counties will likely need to make a general fund contribution to finance such general benefits in order to undertake special benefit

November 13, 1996

3

California Approves Proposition 218

assessment financings of either capital or operating programs.

If Proposition 218's requirement that fees and charges not exceed the proportional cost of service is found to be more restrictive than current law, it could eliminate many routine transfers from enterprise funds to general funds. Because electrical utilities are specifically exempted from the measure, the largest source of such transfers will be unaffected. But any transfers from water, sewer and refuse funds may be threatened.

California's Charter Cities Lose Their Special Status

Among the credits most significantly limited by the measure will be California's 88 charter cities. While they were generally believed to be unencumbered by Proposition 62, Proposition 218 will clearly require that these cities obtain voter approval to impose or raise taxes. Any taxes authorized after January 1, 1995, and before passage of the measure must be validated by voters within two years.

Although the measure will threaten few existing revenues, it denies charter cities what had become their unique flexibility in taxation, to raise business, utility, and transient occupancy taxes by legislative action alone. Such revenue flexibility has historically been a factor in some of the high ratings assigned to charter city obligations. These ratings will have to be reconsidered in this new light.

Revenue Bond Debt of Less Concern, Despite Complications For Compliance With Rate Covenants

The implications of Proposition 218 on revenue debt appear of less fundamental credit concern, although the measure raises a number of procedural questions that must be sorted through. The major new requirement of notice, hearing, and the termination of a rate increase with a majority protest probably does not create a sea change in credit. The risk that a governing board would be unwilling to increase rates due to its political consequences is already inherent in such debt and is currently evaluated by considering such factors as past rate-increase history and comparisons with the rates in neighboring communities. The likelihood of a proposed rate increase generating the level of opposition necessary for a majority protest is extremely remote, although the broader public notice

and hearing requirements might result in some incremental politicization of the process. This new procedure will also significantly increase the cost of undertaking a rate action.

From a credit standpoint, the measure does, however, throw a number of curve balls. It is not clear how rate covenants will be integrated with these new requirements. Some argument has been made that existing rate covenants would survive under the theory that to constrain them in any way would impair pre-existing contracts, and therefore would be in violation of the federal constitution. The case law on the impairments of contract clause, however, does not give solid comfort. In reconciling the legal conflict between the new state constitutional requirements for fees and the federal contracts clause, a court might very well sacrifice the rate covenant as long as the debt itself is repaid. The rate covenants contained in new bond issues would be more clearly subject to Proposition 218, unless they could be pre-approved through a public notice and hearing process.

The measure raises other procedural ambiguities. For example, there is conflicting guidance as to whom public notice must be given, and who has the right to protest. Could a failure to comply with the proper procedure (once the courts make it clear what that is) be determined to undermine the legality of any rate increases previously approved? Will the requirement that charges reflect the cost of services necessitate a new review of each entity's rate structure, and eliminate such "subsidies" as life-line services to low-income households and tiered rate structures to encourage conservation?

It will take a while for a consensus to form on these procedural issues; it will also likely require legislative interpretation and judicial clarification. In the meantime, it is not clear how revenue bond issuers should best proceed.

The complexity of these questions are magnified by the larger revenue credits in the state, such as the California Department of Water Resources and the Metropolitan Water District of Southern California, both of whose revenue bonds are rated **Aa**. Both of these credits are probably insulated from Proposition 218 by their long-standing authority to levy or cause the levy of ad valorem property taxes to meet their obligations. But the more likely scenario is that their

12/03/96 14:41 ☎ 415 274 1726

MOODY'S SF

005

4

November 13, 1996

California Approves Proposition 218

debt will continued to be repaid through the complex flow of payments from retail users to retail utilities, which make payments to local wholesalers, who themselves often make payments to large, regional agencies who are the direct customers of Metropolitan and DWR.

These various retail agencies, which rely on a complex array of rates and charges, property taxes, and assessments to raise the funds to meet their water obligations, will have to each work out the questions raised by this measure. Among the charges prohibited by the measure are standby charges, most commonly used by water agencies, which will now be redefined under the proposition as assessments and subject to those procedures. Some have argued that any existing charges would be grandfathered as pre-existing assessments; likely, a court may have to settle this question.

Assessment Bonds Are Safe, But New Issue Volume Is Likely to Decline

Bonds secured by one of the direct targets of the measure—assessments—are perhaps the least threatened by Proposition 218. Not only did it specifically attempt to 'safe harbor' such debt, but existing debt already fell beyond the scope of the measure because the levies required to service such debt are in place before bond sale. Meeting the new approval requirements will not be difficult in connection with assessments on new development, where property-owner consensus is already the norm. Where assessments for both capital and maintenance purposes will be most difficult is in developed communities, where the volume of its use for debt and operations will be more limited.

Major Questions Remain

As already discussed, a number of legal questions will obscure a clear view of the effect of the measure on municipal debt. One concern raised by several observers is that, in the future, any new voter-approved debt will be subject to reconsideration by the voters due to Proposition 218's restatement of the power of voters to repeal taxes, assessments and fees by referendum. Much in the current body of law suggests that, for example, a majority of voters could not repeal the tax previously approved by two-thirds of the voters to secure general obligation bonds. Such a conclusion would also be contrary to the stated intention of the authors. Presumably this more reasonable interpretation would also apply to Mello-Roos bonds, which would be more at risk from voter reconsideration since they are usually originally approved by developers, then subsequently paid by a new body of taxpayers once the property is developed and sold.

Voter-approved repudiation is only one example of the potential legal land mines embedded in the measure, and the potential damages to municipal credit and the California market that could occur if any of these were to explode. Unfortunately, a full examination of the measure will likely take years of litigation, judicial decision, and the development of market consensus. Many of the new weaknesses in the system will not be exposed until finances are once again stressed, which is also the time when an agency is most likely to aggressively test the borders of the law governing its revenues, and when lawsuits are filed in response. While the passage of Proposition 218 should not freeze the market for municipal debt in California, its shadow is likely to remain somewhat chilling for years to come.

analysts:

David Brodsky
(415) 274-1739

Ken Kurtz
(415) 274-1737

November 13, 1996

5

California Approves Proposition 218

Attachment 1

The Guardino Decision: One Year Later

It has been a year since the State Supreme Court issued its opinion in *Guardino v. Santa Clara*, which surprised the municipal market by affirming the validity of Proposition 62. Adopted by voters in 1986, Proposition 62 was a voter-approved statute that sought to impose a majority-vote requirement for local taxes for general purposes. Several previous court rulings had found the measure unconstitutional, but Guardino reversed these decisions. Although charter cities were considered by most observers to fall outside the scope of the statute, general law cities and counties were clearly subject to the voter requirements.

The big question left open by the court was how to treat taxes imposed prior to the decision, when most lawyers advising local government had considered Proposition 62 to be moot. Many localities had imposed utility user, business license, hotel occupancy, and other taxes since 1986. The revenues generated from such taxes range from the insignificant to more than 20% of some local budgets. One year later, questions as to their validity remain largely unanswered.

The following summarizes the major events subsequent to the Guardino decision.

- The state senate passed SB 1590 (O'Connell) which would have applied the Guardino decision prospectively from its effective date and preserved taxes enacted between 1986 and 1995. The bill

was subsequently stalled in the assembly. A similar bill is expected to be reintroduced in the coming session.

- Meanwhile, about a dozen suits challenging local taxes are winding their way through the lower courts. A higher court decision on any one of them could settle the question of retroactivity. Ironically, the case most likely to first reach an appellate court involves Butte County, where voters ratified the contested taxes a few months after the Guardino decision.
- Many other local agencies have placed measures before the voters to validate previously imposed local taxes. For example, the November election saw voters in Moreno Valley (whose uninsured COPs are rated **Con.(Baa1)** by Moody's) approve the continued levy of utility users and business gross receipts taxes which comprise about 25% of the city's general fund revenues.
- Other agencies are still on the side-lines waiting further legal clarification. For example, Los Angeles County, with more than \$50 million a year at risk from taxes within its unincorporated boundaries, is waiting to see what happens in Alameda County, east of San Francisco, before proceeding with its own election. While voters in Alameda approved continuation of their taxes, that vote may be challenged, since voters within the incorporated areas were able to vote on the taxes to which they were not subject.

November 13, 1996

California Approves Proposition 218

Attachment 2**Does Proposition 218 Herald a New Taxpayer Revolt?**

Although Proposition 218 will likely have far-reaching influence on public finance law in California and is expected to chill new issuance in several sectors over the next few months while lawyers try to figure out what the measure means, it may be premature to read Proposition 218's passage as a sign of renewed voter opposition to taxation. The November election offered a very mixed message of California voter sentiment. The same electorate which added new voter requirements to the state's constitution approved a number of specific taxes and bond issues. The following are a few notable examples.

- Voters statewide approved nearly \$1 billion in bonds for water improvements. Nearly half of these funds will be spent on restoration of the Sacramento-San Joaquin Delta, with the balance going to local water projects. Another statewide bond measure to fund local jails and juvenile justice facilities failed.
- Despite the two-thirds voter approval threshold, a number of special taxes and general obligation measures were approved across the state. Although a \$2.4 billion general obligation bond authorization for Los Angeles Unified School District was defeated, even its failure could be seen as heartening; with 65.6% approval, the measure fell only 1% shy of passage.
- Besides the number of measures validating existing general taxes to protect them from the Guardino decision, a number of new general taxes

appeared on the ballot. Anaheim voters approved an increase in the hotel tax, the revenues from which will indirectly support debt for public infrastructure required to expand the Disneyland theme park. (As a charter city, Anaheim's decision to go to the voters this November represented a defensive strategy in case Proposition 218 passed.) The County of Los Angeles received voter approval for an expansion of its park and recreation district assessment. Ironically, such voter approval of assessments at a regular election is now banned by Proposition 218, which will require mailed responses under its revised "majority-protest" procedures.

- Santa Clara County, where the legal skirmish over a transportation sales tax led to the Guardino decision (which found, among other things, that two-thirds voter approval was required for that ("special tax"), was back on the battlefield. In an attempt to meet the legal standards of a general tax, and thereby reduce its voter requirements to a simple majority, and still use the proceeds to fund transportation improvements, the county went to voters with two measures. The first was purely advisory, directing the board of supervisors to make transportation funding its highest priority for the use of any new revenues. The second was for the approval of a half-cent sales tax for general purposes of the county. It is likely that these measures will be litigated (through a validation action, if nothing else), and the result may shine new light on the meaning of Proposition 13 and subsequent measures.

572BP3 ■

Understanding Proposition 218



Elizabeth G. Hill, Legislative Analyst ♦ December 1996

Legislative Analyst's Office

UNDERSTANDING PROPOSITION 218

Table of Contents

Introduction	5
How Proposition 218 Changes Local Finance and Governance	6
Understanding the Vocabulary of Proposition 218	17
Are Existing Revenues Affected by Proposition 218?	20
What Must a Local Government Do to Raise New Revenues?	31
May Residents Overturn Local Taxes, Assessments, and Fees? ...	36
Appendix I: Areas in Which Legislative or Judicial Clarification May Be Needed	38
Appendix II: Text of Proposition 218	42

INTRODUCTION

Proposition 218 significantly changes local government finance. This constitutional initiative—approved by the state's voters in November 1996—applies to each of California's nearly 7,000 cities, counties, special districts, schools, community college districts, redevelopment agencies, and regional organizations.

The purpose of this guide is to help the Legislature, local officials, and other parties understand Proposition 218, including the actions local governments must take to implement it. The guide includes five chapters:

- ◆ How Proposition 218 Changes Local Finance and Governance.
- ◆ Understanding the Vocabulary of Proposition 218.
- ◆ Are Existing Revenues Affected by Proposition 218?
- ◆ What Must a Local Government do to Raise New Revenues?
- ◆ May Residents Overturn Local Taxes, Assessments, and Fees?

Finally, the appendix to this guide summarizes major areas of uncertainty pertaining to Proposition 218 (some of which the Legislature may wish to address), and includes the text of Proposition 218 (now Article XIII C and D of the California Constitution).

Legislative Analyst's Office

CHAPTER 1

How Proposition 218 Changes Local Finance and Governance

Nearly two decades ago, Proposition 13 sharply constrained local governments' ability to raise property taxes, the mainstay of local government finance. Proposition 13 also specified that any local tax imposed to pay for specific governmental programs—a "special tax"—must be approved by two-thirds of the voters.

Since that time, many local governments have relied increasingly upon *other* revenue tools to finance local services, most notably: assessments, property-related fees, and a variety of small general purpose taxes (such as hotel, business license, and utility user taxes). It is the use of *these* local revenue tools that is the focus of Proposition 218.

In general, the intent of Proposition 218 is to ensure that all taxes and most charges on property owners are subject to voter approval. In addition, Proposition 218 seeks to curb some perceived abuses in the use of assessments and property-related fees, specifically the use of these revenue-raising tools to pay for general governmental services rather than property-related services.

In this chapter, we provide an overview and perspective on the impact of Proposition 218 on local finance and governance.

Legislative Analyst's Office

PROPOSITION 218 CHANGES LOCAL GOVERNMENT FINANCE

Proposition 218 makes several important changes regarding local government finance. Figure 1 summarizes our observations regarding their fiscal impact.

Figure 1

Proposition 218's Impact on Local Finance

- ◆ The measure's fiscal impact cannot be fully ascertained until the uncertainty regarding some of its provisions are resolved.
- ◆ Most local revenues are not affected.
- ◆ The impact on certain local governments could be substantial.
- ◆ Local government revenue reductions will begin in 1997.
- ◆ In the long term, local government revenues are likely to be somewhat lower and come from different sources.

Some Uncertainty Regarding Proposition 218's Provisions

Proposition 218's requirements span a large spectrum, including local initiatives, water standby charges, legal standards of proof, election procedures, and the calculation and use of sewer assessment revenues. Although the measure is quite detailed in many respects, some important provisions are not completely clear.

In this guide, we provide our interpretation of the measure's requirements. This interpretation is based on our extensive review

of the measure, as well as consultations with the measure's drafters, local government officials, and legal counsel. In some cases, however, we are not able to fully ascertain the meaning or scope of a Proposition 218 requirement. We believe our uncertainty—frequently shared by other analysts of the measure—will be resolved only when the Legislature enacts implementing statutes or court rulings become available.

Accordingly, throughout this guide we discuss Proposition 218 as we understand it. Where other parties have different opinions or the measure's requirements are not clear, we provide this information. Finally, we provide in Appendix I a summary of the areas in which clarifying legislative or judicial action may be necessary.

Most Local Revenues Are Not Affected

California local governments raise more than \$50 billion annually from taxes, assessments, and fees. As Figure 2 shows, most of these local revenues are *not* affected directly by Proposition 218. Instead, Proposition 218's provisions apply to a relatively small subset of local government revenues.

Given the relatively small number and dollar value of local revenue sources that are affected by Proposition 218, we think it is highly unlikely that the measure could cause more than a 5 percent annual decrease in *aggregate* local government own-source revenues.

Figure 2**Which Local Revenues Are Affected by Proposition 218?**

Affected		Not Directly Affected	
Taxes			
New and some recently imposed "general" taxes.		Property taxes. Bradley-Burns sales taxes. Special taxes. Vehicle license taxes. Redevelopment revenues. Mello-Roos taxes. Timber taxes.	
Assessments			
All new or increased assessments. Some existing assessments.		Most existing assessments.	
Fees			
Property-related fees. (Fees imposed as an "incident of property ownership," not including gas, electric, or developer fees.)		Fees that are <i>not</i> property-related. Gas and electric fees. Developer fees.	

Impact on Certain Local Governments May Be Substantial

The actual impact of Proposition 218 on local public services may be greater than our 5 percent estimate would suggest, however, for a variety of reasons. First, some governments are highly reliant upon the types of assessments and fees that would

Legislative Analyst's Office

be restricted by this measure. These local governments—typically, small, newly incorporated cities, and library, fire, and park and recreation special districts—may sustain revenue reductions of much more than 5 percent. Some special districts also lack the authority to propose taxes to replace the lost assessment and fee revenues.

Second, many local governments have limited flexibility to reduce programs when revenues decline. Most major county programs, for example, are subject to state and federal mandates and spending requirements. As a result, relatively small revenue losses can trigger significant reductions to the few programs over which the local government has control.

Finally, many local governments will experience both revenue reductions *and* cost increases to comply with Proposition 218. For example, some local governments will lose part of their assessment and fee revenues, and have to pay:

- ♦ Assessments charges to other local governments.
- ♦ Increased election, property-owner notification, and administrative costs.

These increased costs will increase the fiscal impact of this measure on local government programs.

Fiscal Impact Begins in 1997

The fiscal impact of Proposition 218 will begin almost immediately. Within eight months of Proposition 218's passage, local governments will need to reduce or eliminate certain existing assessments and fees to meet the measure's requirements. (These

Legislative Analyst's Office

requirements are discussed in Chapter Three.) We estimate that these actions will reduce local government revenues by at least \$100 million in 1997-98.

Proposition 218 also requires local governments to place before the voters certain existing assessments and taxes. Unless the voters ratify these assessments and taxes, local governments will experience *additional* revenues losses, potentially exceeding \$100 million annually.

Longer Term: Different Revenue Sources, Probably Less Money

Proposition 218 restricts local governments' ability to impose assessments and property-related fees—and requires elections to approve many local government revenue raising methods. Because of this, it is likely that over the long term local governments will raise fewer revenues from assessments, property-related fees, and some taxes.

Unless these reduced local revenues are replaced with other revenues, local government spending for local public services will decrease accordingly. What other revenues could offset these revenue reductions? It is likely that local governments will pursue one or more of the following sources of potential replacement revenues:

- ◆ Redevelopment revenues.
- ◆ Developer exactions.

- ◆ General taxes imposed on particular groups (such as business license, hotel occupancy, and sporting or entertainment admission taxes).
- ◆ Special taxes imposed on properties within small, discrete areas.
- ◆ Intergovernmental transfers.
- ◆ Non-property related fees.

Limited Ability to Raise Replacement Revenues. Local governments' ability to expand these six other revenue sources is not great. Various legal and practical restrictions limit a major expansion of redevelopment or developer exactions, for example. In addition, many local government observers believe that existing hotel and business taxes are already high and not all parts of the state have major entertainment or sporting centers. (We include these taxes on the above list because these taxes are not paid directly by most voters. Thus, the likelihood of their being approved by a majority of voters may be higher than other general taxes.)

Similarly, while local governments in California have had difficulty securing the requisite two-thirds vote to impose special taxes, it is likely that some additional special taxes will be approved. Special taxes probably are more likely to be adopted in small, discrete areas of a community where the commonality of interest is high, however, rather than on a community-wide basis. Thus, the likelihood of generating significant revenues from special taxes is not great.

Additional major revenues from the state or federal government also do not appear likely, given the fiscal limitations faced by both these level of governments. (Please see our November 1996

publication, *California's Fiscal Outlook*, for our projections of the state's fiscal condition.)

This leaves the last revenue source on our list: non-property related fees. Ultimately, the ability of local government to expand this revenue source turns on how the term "property-related" fee is defined by the Legislature or courts. If the definition of a property-related fee is broad, then local government's ability to replace revenues lost by Proposition 218 is limited. Conversely, if this definition is narrow, then local government will have greater opportunities to replace lost revenues with expanded non property-related fees. (Even then, however, the state Constitution and statutes do not permit local government to charge fees in excess of costs.)

All in all, our review indicates that most local governments will have some ability to raise revenues to replace some of the funding lost by Proposition 218. This ability, however, is limited. Accordingly, we expect that in the long term, local governments will raise somewhat less revenues than they would have otherwise—and local government revenues will come from somewhat different sources. These revenue reductions will result in lower payments by people and businesses to government—and decreased spending for local public services.

PROPOSITION 218 CHANGES LOCAL GOVERNANCE

In addition to changing local finance, Proposition 218 changes the governance roles and responsibilities of local residents and property owners, local government, and potentially, the state. While

Legislative Analyst's Office

the full ramifications of these changes will not be known for years to come, some elements are already apparent.

Increased Role for Local Residents And Property Owners

Prior to Proposition 218, the local resident and property owner's role in approving most new local government revenue-raising measures was minimal. Local governments typically raised new funds by imposing new or increased assessments or fees, or in the case of charter cities, general-purpose taxes on utility use, business licences, and hotel occupancy. In most cases, California residents or property owners could object to these taxes or charges at a public hearing or during a statutory protest procedure, but these taxes or charges were not placed on the ballot. In short, locally elected governing bodies held most of the power over local revenue raising.

Proposition 218 shifts most of this power over taxation from locally elected governing boards to residents and property owners. In order to fulfill this considerable responsibility, local residents and property owners will need greater information on local government finances and responsibilities. Even with this information, however, the task of local residents and property owners will be difficult, given the frequently confusing manner in which program responsibilities are shared between state and local government, and among local governments.

Legislative Analyst's Office

Local Government Remains Responsible for Expenditures

Local government's powers, in contrast, become significantly constrained. While locally elected governing boards continue to be fully responsible for decision-making regarding the expenditure of public funds, they now have very little authority to raise funds without a vote of the residents or property owners. In addition, Proposition 218 limits local government's authority to call an election to raise revenues. Specifically, except in cases of emergency, local governments now may hold elections on general taxes only once every two years (consolidated with an election for members of the governing board.) Moreover, Proposition 218 limits the amount of an assessment or property-related fee that may be put before the property owners for a vote.

State Government Role May Expand

Proposition 218 may also alter the state's role and responsibilities regarding local government in several important ways. First, the Legislature will be asked to play a large role in interpreting Proposition 218's requirements, and helping set the rules regarding local government finance. In some cases, local governments are likely to ask for urgency legislation to enact these measures because the deadline for compliance with some Proposition 218 provisions is July 1, 1997.

Second, the Legislature will probably receive requests for fiscal assistance from local governments. These requests are likely to begin in the spring of 1997, as the fiscal consequences of the assessment and fee restrictions become apparent. Local

governments are likely to turn to the state because it has more fiscal flexibility than local government. For example, the Legislature may raise taxes at any time with a two-thirds vote of its members.

Finally, any effort to restructure state-local program responsibilities is now more complicated. Specifically, the Legislature will have less flexibility to realign programs in a manner that increases local government responsibility without providing a direct subvention of state funds. This is because local governments have little or no flexibility to adjust their own revenues.

CHAPTER 2

Understanding the Vocabulary of Proposition 218

Any discussion of Proposition 218 requires an explanation of several local government finance words and terms. This chapter explains the vocabulary.

WHAT IS A TAX?

Taxes are government's most flexible revenue raising tool. A tax is a charge on an individual or business that pays for governmental services or facilities that benefit the public broadly. There need not be any direct relationship between how much tax a person pays and how much service he or she receives from government. Example of taxes include the property tax, sales tax, business licence tax, hotel occupancy tax, and utility users tax.

Special Tax Versus General Tax

A tax is called a "special" tax if its revenues are used for specific purposes and a "general" tax if its revenues may be used for any governmental purpose. This distinction is important because it determines whether a tax must be approved by a majority vote of the electorate (general tax)—or a two-thirds vote (special tax).

Legislative Analyst's Office

WHAT IS AN ASSESSMENT?

An assessment is a charge levied on property to pay for a public improvement or service that benefits property. Assessments are usually collected on the regular property tax bill. They are different, however, from the regular 1 percent property tax and property tax debt overrides in that assessment rates are not based on the value of the property. Assessments are also different from another charge that sometimes is placed on the property tax bill, parcel taxes. Unlike parcel taxes, assessments typically were not voter approved prior to Proposition 218. In addition, assessment rates were linked to the cost of providing a service or improvement, whereas parcel taxes could be set at any amount. Typical assessments include those for flood control improvements, streets, and lighting and landscaping.

WHAT IS A FEE?

A fee is a charge imposed on an individual or business for a service or facility provided directly to an individual or business. Local governments charge fees for a wide range of purposes, from park entry fees to building plan check fees. The amount of the fee may not exceed the cost of government to provide the service.

A New Term: "Property-Related Fee"

Proposition 218 restricts property-related fees, defined as fees imposed "as an incident of property ownership." At this time, there is no consensus as to which fees meet this definition. The drafters of Proposition 218 indicate that it was their intent to include most

Legislative Analyst's Office

fees commonly collected on monthly bills to property owners, such as those for water delivery, garbage service, sewer service, and storm water management fees. Other analysts of Proposition 218 contend that fees that vary by level of service (for example, a fee for metered water usage) should not be considered a property-related fee, because it is based on service usage, rather than property ownership. Because Proposition 218 does not restrict nonproperty-related fees, the definition of this term will be an important and sensitive issue for the Legislature and courts.

OVERLAPPING TERMS

While the terms tax, assessment, and fee are each legally distinct, in practice they overlap. For example, communities in California may finance streets from taxes, assessments, and/or fees. In addition, local government officials sometimes call a charge one term, when it was legally adopted as another. As a result, the work of sorting out whether a particular charge must comply with Proposition 218's requirements for a tax, assessment, or fee will not always be easy.

CHAPTER 3

Are Existing Revenues Affected by Proposition 218?

Local governments must bring their existing taxes, assessments and property-related fees into conformity with Proposition 218. The deadline for each of these actions is:

- ◆ July 1, 1997—for assessment and property-related fees.
- ◆ November 6, 1998—for taxes.

Below, we discuss Proposition 218's requirements regarding *existing* taxes, assessments, and fees. (The requirements for *new* or *increased* revenue raising tools is the topic of the next chapter.) After each section, we answer some common questions regarding Proposition 218's requirements.

REQUIREMENTS FOR EXISTING TAXES

Proposition 218 does not affect existing special taxes or most general taxes. Proposition 218 affects only those *general* taxes that were imposed in 1995 or 1996 without a vote of the people.

In order to continue such a tax, Proposition 218 requires the governing body to place the tax before the voters by November 6, 1998. Unless the governing body unanimously votes to declare the election an emergency, the tax election must be consolidated

with a regularly scheduled election for members of the governing body. The local government may continue an existing tax if it is approved by a majority vote.

Questions

Are general taxes imposed before 1995, without a vote of the people, safe from challenges?

No. Our review indicates that general law cities and counties that imposed general taxes in the early 1990s, without a vote of the people, continue to be vulnerable to a challenge that they did not place their tax on the ballot as required by Proposition 62. In 1995, the California Supreme Court reversed earlier lower court decisions and found Proposition 62 to be constitutional.

Are Mello-Roos taxes affected?

No. Mello-Roos taxes are not affected by Proposition 218. Mello-Roos taxes—usually imposed on new subdivisions to pay for infrastructure—are special taxes and already require a two-thirds vote. There are a very limited number of cases, however, where a local government has used Mello-Roos law to impose an *assessment* without a two-thirds vote. We believe local governments must bring these assessments into compliance with Proposition 218's assessments provisions (discussed below).

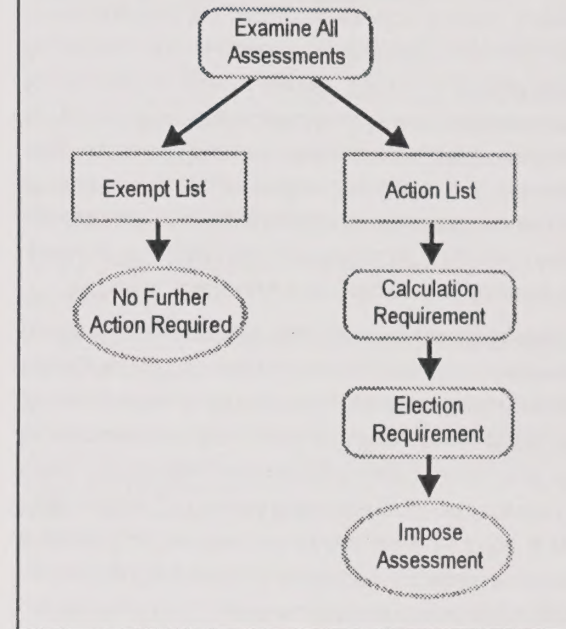
REQUIREMENTS FOR EXISTING ASSESSMENTS

Local governments must review all existing assessments, including standby-charges (which the measure defines as assessments). Figure 3 (see next page) shows the actions local governments must take to bring their existing assessments into compliance with Proposition 218.

Legislative Analyst's Office

Figure 3

Actions Required for Existing Assessments



The Examination Requirement: Many Assessments Will Qualify for Exempt List

Local government must examine each assessment to determine whether it meets one of the conditions for placement on the "exempt list." These conditions are:

Legislative Analyst's Office

- ♦ The assessment was previously approved by voters—or by all the property owners at the time the assessment was created.
- ♦ All of the assessment proceeds are pledged to bond repayment.
- ♦ All the assessment proceeds are used to pay for sidewalks, streets, sewers, water, flood control, drainage systems, or “vector control” (such as mosquito control).

Our review indicates that more than half of all existing assessments are likely to be exempt. Generally, this is because the assessment’s funds are used for one of the approved purposes or are pledged to bond repayment—or the assessment was agreed to by a land developer, the sole property owner at the time the assessment was established.

If an assessment is not exempt, then the local government must eliminate the assessment or bring it into compliance with Proposition 218’s assessment calculation and election requirements (described below). Our review indicates that the types of assessments that are not likely to satisfy any of the conditions for exemption are: fire, lighting and landscaping, and park and recreation assessments.

The Calculation Requirement: One of Proposition 218’s Most Significant Changes

Local governments must recalculate all existing assessments that do not qualify for the exempt list. Our review indicates that in many cases, Proposition 218’s provisions regarding the calculation of assessments will result in local governments lowering

the amount they collect in assessments from property owners, or eliminating the assessment. We identify the specific calculation provisions below.

First: Determine If a Project or Service Provides Special Benefits. The local government must determine whether property owners would receive a “special benefit” from the project or service to be financed by the assessment. Proposition 218 defines a special benefit as a particular benefit to land and buildings, not a general benefit to the public or a general increase in property values. If a project or service would not provide such a special benefit, Proposition 218 states that it may not be financed by an assessment. Our review indicates that local governments will find it difficult to demonstrate that some existing assessments for ambulance, library, police, business improvement, and other services satisfy this tightened definition of special benefit. As a consequence, some existing assessments may need to be eliminated.

Second: Estimate the Amount of Special Benefit. Local government must use a professional engineer’s report to estimate the *amount* of special benefit landowners would receive from the project or service, as well as the *amount* of “general benefit.” This step is needed because Proposition 218 allows local government to recoup from assessments only the proportionate share of cost to provide the special benefit. That is, if special benefits represent 50 percent of total benefits, local government may use assessments to recoup half the project or service’s costs. Local governments must use other revenues to pay for any remaining costs. This limitation on the use of assessments represents a major change from the law prior to Proposition 218, when local governments could

recoup from assessments the costs of providing both general and special benefits.

Third: Set Assessment Charges Proportionally. Finally, the local government must set individual assessment charges so that no property owner pays more than his or her proportional share of the total cost. This may require the local government to set assessment rates on a parcel-by-parcel basis. Properties owned by schools and other governmental agencies—previously exempt from some assessment charges—now must pay assessments.

Election Requirement: All Property-Owners Vote on Assessments

Local governments must mail information regarding assessments to all property owners. (Prior to Proposition 218, large communities could publish assessment information, rather than mail it to every property owner.) Each assessment notice must contain a mail-in ballot for the property owner to indicate his or her approval or disapproval of the assessment.

After mailing the notices, the local government must hold a public hearing. At the conclusion of the hearing, the local government must tabulate the ballots, weighing them in proportion to the amount of the assessment each property owner would pay. (For example, if homeowner Jones would pay twice as much assessment as homeowner Smith, homeowner Jones' vote would "count" twice as much as homeowner Smith's vote.) The assessment may be imposed only if 50 percent or more of the weighted ballots support the assessment.

Legislative Analyst's Office

Questions

Would part, or all, of an assessment be exempt if most of its proceeds are used for an approved program?

Probably not. Proposition 218 states that an assessment is exempt if its proceeds are used *exclusively* for one or more of seven approved programs. However, the measure does not define what costs may be included under these approved programs. Thus, it is not clear if an assessment that funds streets (an approved program) and curbs or street lighting (not identified as approved programs) is exempt. Legislative action may be needed to clarify this.

Is the difference between "general benefit" and "special benefit" clear?

No. Proposition 218 defines a "special benefit" as a distinct benefit to real property in a specific area. All other benefits—including benefits to people's health, education, or safety, or general enhancements to property values—are considered "general benefits." While these two benefits are distinct in concept, in practice they may be difficult to distinguish. Because of the importance of the term "special benefit," legislative or court action may be needed to clarify its definition.

Do renters get to vote?

Renters may vote on an assessment if their lease agreement specifies that they are responsible for paying the assessment. This type of provision in a lease agreement is more common for commercial properties than for residential properties.

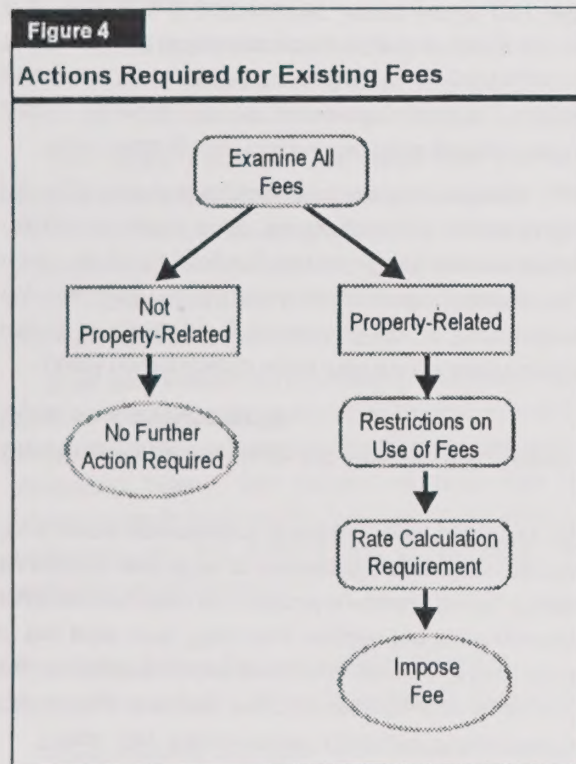
Who gets to vote when an assessment is to be levied on public property or properties with multiple owners?

This is not addressed in the measure. Thus, it would require clarification.

Legislative Analyst's Office

REQUIREMENTS FOR EXISTING FEES

As with assessments, local governments must complete a multi-step review of all fees. Figure 4 summarizes the process.



Examination Requirement: Identifying Property-Related Fees

Local government must begin by examining all existing fees to determine whether they are "property-related" fees, imposed as an "incident of property ownership." (We discuss this term and the controversy surrounding it in Chapter Two). As Figure 4 shows, if a fee is *not* property-related, then the local government need not take any further action regarding the fee. Conversely, if the fee is property-related, then the local government must make sure that the fee complies with Proposition 218's restrictions on use of fee revenues and the rate calculation requirements. The deadline for these actions is July 1, 1997.

New Restrictions on Use of Fees

Proposition 218 specifies that no property-related fee may be:

- ◆ Levied to pay for a general governmental service, such as police or fire service.
- ◆ Imposed for a service not used by, or immediately available to, the property owner.
- ◆ Used to finance programs unrelated to the property-related service.

In order to comply with these restrictions, local governments will need to eliminate or reduce some existing fees. For example, some small cities currently charge property owners fees for ambulance or fire service. Proposition 218 does not permit governments to impose property-related fees for these purposes.

Similarly, some cities collect "franchise fees" or "in-lieu property taxes" from their water departments and deposit these revenues into their general funds. The cost of these franchise fees and taxes is passed onto local residents in terms of higher water fees. If water fees are considered property-related fees, then Proposition 218 would forbid this diversion of fee revenues. (Some local government observers believe that this diversion of fee revenues was impermissible *prior* to Proposition 218, as well.)

Possible Local Government Response to Fee Restrictions.

In some cases, it may be possible for a local government to restructure a property-related fee so that it would no longer be considered a fee imposed "as an incident of property ownership." For example, a mandatory per parcel garbage collection fee may be considered a property-related fee, while an optional garbage collection service charge may not. Similarly, some local governments may be able to show that their franchise fee or in-lieu property tax represents their water department's reasonable share of central administrative expenses. If so, then Proposition 218 would not prohibit this transfer of revenues from the water department. Finally, some local governments may elect to privatize certain functions formally financed by property-related fees. Proposition 218 imposes no limit on private fees.

Fee Rate Calculation Requirement

After complying with Proposition 218's restrictions on the use of property-related fees, the local government must make sure that its property-related fees comply with the measure's calculation requirements. Specifically, local governments must make sure

Legislative Analyst's Office

that no property owner's fee is greater than the proportionate cost to provide the property-related service to his or her parcel. Like assessments, this requirement may result in local governments setting property-related fee rates on a block-by-block, or parcel-by-parcel basis.

This fee rate calculation requirement—sometimes called the "proportionality" requirement—will make it difficult for local government to continue certain programs, such as those that offer reduced rates to low-income residents. This is because local governments typically finance these lower rates by charging higher rates to other property-owners. If these fees are considered property-related fees, the higher rates would not be permitted by Proposition 218. In order to continue these programs in the future, therefore, the local government would need to offset the cost of the program with other revenues, such as general tax revenues.

Question

Are regulatory fees—such as rent control, alarm, and weed abatement fees—considered property-related fees?

This is not clear. Generally, we interpret Proposition 218's term "property-related fees" as including all fees that a property-owner has no feasible way to avoid. That is, a fee is property-related if land could not be owned and used without paying the fee. Accordingly, we do not consider fees for optional activities, such as the registration of alarm systems or the removal of weeds from neglected parcels, to be property-related. Rent control administrative fees are a closer call. Generally, we think these fees would be considered property-related if there were no practical way that the owner could avoid the fee, short of selling the property or fundamentally changing its use. Clearly, the definition of property-related fees will be a sensitive and important issue for the Legislature and courts.

Legislative Analyst's Office

CHAPTER 4

What Must a Local Government Do to Raise New Revenues?

In order to raise a new tax, assessment, or property-related fee, or to increase an existing one, local governments must comply with many of the same provisions discussed in the previous chapter. In general, these requirements are that local governments may use assessments and property-related fees only to finance projects and services that directly benefit property—and that most revenue-raising measures be approved in an election. Figure 5 (see next page) summarizes the vote required in these elections.

This chapter explains the steps local government must take to raise a new tax, assessment or property-related fee, or to increase an existing one.

REQUIREMENTS FOR NEW TAXES

In order to impose or increase a tax, local government must comply with the following provisions:

- ◆ All general taxes must be approved by a majority vote of the people. (A 1986 statutory initiative—Proposition 62—previously imposed this vote requirement

Figure 5

New or Increased Taxes, Assessment, and Fees What Vote is Needed?

Type	Vote Needed	Who Votes	Vote Requirement
Taxes			
General	Yes	All voters in community or affected area.	Majority
Special	Yes	All voters in community or affected area.	Two-thirds
Assessments			
All	Yes	Property owners (and renters responsible for paying assessments) in affected area.	Majority, weighted in proportion to assessment liability.
Fees			
General, not property related	No	N/A	N/A
Property related	Yes, for any service other than water, sewer, or refuse collection.	Local government may choose: • Property owners (and renters responsible for paying fee) in affected area, or • Electorate in the affected area.	Majority of property owners or two-thirds of electorate. Local governments <i>may</i> weight ballots in proportion to fee liability.

on *general law* cities and counties. Proposition 218 expands this requirement to include *charter* cities, such as Los Angeles, Oakland, and San Francisco.)

- ◆ Elections for general taxes must be consolidated with a regularly scheduled election for members of the local governing body. (In an emergency, this provision may be waived by a unanimous vote of the governing body.)
- ◆ Any tax imposed for a specific purpose is a "special tax," *even if its funds are placed into the community's general fund*. (Prior to Proposition 218, all taxes placed into a community's general fund were commonly considered general taxes, requiring only a majority vote.)

REQUIREMENTS FOR NEW ASSESSMENTS

All new or increased assessments must follow the assessment calculation and election requirements discussed in the previous chapter. There are no exceptions to this requirement.

As a practical matter, this requirement will mean that programs that benefit people, rather than specific properties—such as libraries, mosquito abatement, recreation programs, police protection, and some business improvement programs—must be financed by general or special taxes or by other nonassessment revenues.

Legislative Analyst's Office

Questions

Must a local government comply with both Proposition 218's assessment approval process and the existing statutory process for assessment approval?

Following both of these assessment approval processes is likely to be duplicative and confusing to property owners. Most local government observers agree that some legislative action to reconcile the two assessment approval processes is needed.

Is an assessment considered "new or increased" if it is raised by a cost-of-living factor that was part of the assessment's rate structure?

This is not clear. Proposition 218 states that a *tax* is not to be considered new or increased if it is increased to a level previously approved by the voters. However, the measure does not include any such provision regarding assessments or fees. It is possible that any increase in assessments may be subject to the new calculation and election requirements.

REQUIREMENTS FOR NEW FEES

To impose a new or increased property-related fee, local government must comply with the fee restriction and fee rate calculation requirements discussed in the last chapter.

Local governments must also:

- ◆ Mail information regarding the proposed fee to every property owner.
- ◆ Hold a hearing at least 45 days after the mailing.

Legislative Analyst's Office

- ◆ Reject the proposed fee if written protests are presented by a majority of the affected property owners.
- ◆ Hold an election on any property-related fee, other than a fee for water, sewer, or refuse collection. (Figure 5 shows the vote required in these elections.)

As a practical matter, local governments will find it much more difficult—and expensive—to impose or increase property-related fees. In some cases, local governments are probably more likely to try to raise revenues through non property-related fees or taxes.

Question

Could a local government impose a charge on property owners that is not an assessment, tax, or property-related fee?

No. Proposition 218 states that all charges on property as an incident of property ownership must be a tax, assessment, or property-related fee. Proposition 218 further states that if such a charge on property is not a tax or an assessment, it is a property-related fee.

CHAPTER 5

May Residents Overturn Local Taxes, Assessments, and Fees?

Proposition 218 expands California residents' power to challenge local revenue raising measures.

GREATER INITIATIVE POWERS

Prior to Proposition 218, the extent to which local residents could use an initiative to challenge local government revenue raising methods was not certain. In a 1995 case, *Rossi v. Brown*, the California Supreme Court ruled that people had the power to use the initiative to repeal a minor tax. There have been no court rulings, however, addressing the question of whether an initiative may be used to repeal a more substantial revenue source.

Proposition 218 eliminates any ambiguity regarding the power of local residents to use the initiative by stating that residents of California shall have the power to repeal or reduce any local tax, assessment, or fee. In addition, the measure forbids the Legislature and local governments from imposing a signature requirement for local initiatives that is higher than that applicable to statewide statutory initiatives. As a consequence of these provisions, the only limits on local residents' ability to overturn local revenue raising

measures appear to be those in the federal constitution, such as the federal debt impairment clause.

Question

Could a local initiative or lawsuit eliminate a revenue stream that is pledged to bond repayment?

This question has evoked considerable controversy. Generally, many bond specialists indicate that the debt impairment clause in the federal constitution would prevent local residents from eliminating a new or existing revenue stream if that action would jeopardize the security of bonded indebtedness. Some local government observers, however, would like the Legislature to place a time limit on local initiatives or take other action to provide greater security to bond holders.

SHIFT OF BURDEN OF PROOF

Prior to Proposition 218's passage, the courts allowed local governments significant flexibility in determining fee and assessment amounts. A business or resident challenging the validity of a fee or assessment carried the "burden of proof" to show the court that the fee or assessment was illegal. Proposition 218 changed this legal standard by shifting the burden of proof to local governments. Now local governments must prove that any disputed fee or assessment charge is legal.

Legislative Analyst's Office

APPENDIX I

Areas in Which Legislative or Judicial Clarification May Be Needed

As we discuss throughout this guide, while Proposition 218 is quite detailed in many respects, some important provisions are not completely clear. This appendix summarizes the major questions regarding Proposition 218 that must be resolved so that local governments can begin implementation.

Because Proposition 218 sets a July 1, 1997 deadline for local governments to bring existing fees and assessments into conformity with the measure's requirements, legislative or judicial clarification on questions related to assessments and fees is needed as soon as possible.

PROPERTY-RELATED FEES

- ◆ What is included in the definition of a property-related fee?
- ◆ Are water charges that are based on metered use of water property-related fees?
- ◆ Are regulatory fees, such as rent control administrative fees, property-related fees?
- ◆ Are lease payments and other such charges on government-owned assets property-related fees?

Legislative Analyst's Office

- ◆ How precisely must local government allocate shares of costs for a property-related service? Can local government set general fee rate categories, or must local government determine the actual cost of service to every parcel?

ASSESSMENTS

- ◆ What is a "special benefit" and how can it be distinguished from a "general benefit?"
- ◆ Existing assessments used exclusively for sidewalks, streets, sewers, water, flood control, drainage systems, and vector control are exempt from the measure's calculation and election requirements. How broadly should these exemptions be interpreted?
- ◆ How precisely must local government allocate shares of costs for an assessment? Can local government set general assessment rate categories, or must local government determine the actual cost of service to every parcel?
- ◆ If an existing assessment is increased by a formula that was set forth at the time the existing assessment was imposed, must the assessment comply with the measure's calculation and election requirements? Similarly, need the measure go through these processes again if a *future* assessment is increased by a formula set forth at the time the new assessment was imposed?
- ◆ How should the existing statutory assessment approval process be reconciled with Proposition 218's assessment approval process?

- ◆ Some assessments are annually re-imposed by local government. Must a local government annually repeat the calculation and election procedures required by Proposition 218?
- ◆ If an assessment that is annually re-imposed by local government is currently eligible for the exempt list, must it comply with Proposition 218's calculation and election procedures when it is re-imposed next year?

ELECTIONS

- ◆ What procedures should govern the assessment and fee elections?
- ◆ Who may vote on referendums to repeal assessments, fees, or taxes?
- ◆ How will a local government determine whether a renter is eligible to vote?
- ◆ Who gets to vote when a parcel is owned by multiple parties, or by a governmental entity?

TAXES

- ◆ Are Mello-Roos taxes affected in any way? Similarly, how should assessments imposed under Mello-Roos law be treated?
- ◆ Is the measure's requirement that certain existing taxes be ratified by the voters an unconstitutional referendum on taxes?

DEBT

- ♦ Could a local initiative jeopardize a revenue stream pledged to the payment of existing (or future) debt?

Legislative Analyst's Office

APPENDIX II

Text of Proposition 218

This initiative measure adds Articles XIII C and D to the California Constitution.

RIGHT TO VOTE ON TAXES ACT

SECTION 1. TITLE. This act shall be known and may be cited as the "Right to Vote on Taxes Act."

SECTION 2. FINDINGS AND DECLARATIONS. The people of the State of California hereby find and declare that Proposition 13 was intended to provide effective tax relief and to require voter approval of tax increases. However, local governments have subjected taxpayers to excessive tax, assessment, fee and charge increases that not only frustrate the purposes of voter approval for tax increases, but also threaten the economic security of all Californians and the California economy itself. This measure protects taxpayers by limiting the methods by which local governments exact revenue from taxpayers without their consent.

SECTION 3. VOTER APPROVAL FOR LOCAL TAX LEVIES. Article XIII C is added to the California Constitution to read:

ARTICLE XIII C

SECTION 1. Definitions. As used in this article:

(a) "General tax" means any tax imposed for general governmental purposes.

(b) "Local government" means any county, city, city and county, including a charter city or county, any special district, or any other local or regional governmental entity.

(c) "Special district" means an agency of the state, formed pursuant to general law or a special act, for the local performance of governmental or proprietary

Legislative Analyst's Office

functions with limited geographic boundaries including, but not limited to, school districts and redevelopment agencies.

(d) "Special tax" means any tax imposed for specific purposes, including a tax imposed for specific purposes, which is placed into a general fund.

SEC. 2. Local Government Tax Limitation. Notwithstanding any other provision of this Constitution:

(a) All taxes imposed by any local government shall be deemed to be either general taxes or special taxes. Special purpose districts or agencies, including school districts, shall have no power to levy general taxes.

(b) No local government may impose, extend, or increase any general tax unless and until that tax is submitted to the electorate and approved by a majority vote. A general tax shall not be deemed to have been increased if it is imposed at a rate not higher than the maximum rate so approved. The election required by this subdivision shall be consolidated with a regularly scheduled general election for members of the governing body of the local government, except in cases of emergency declared by a unanimous vote of the governing body.

(c) Any general tax imposed, extended, or increased, without voter approval, by any local government on or after January 1, 1995, and prior to the effective date of this article, shall continue to be imposed only if approved by a majority vote of the voters voting in an election on the issue of the imposition, which election shall be held within two years of the effective date of this article and in compliance with subdivision (b).

(d) No local government may impose, extend, or increase any special tax unless and until that tax is submitted to the electorate and approved by a two-thirds vote. A special tax shall not be deemed to have been increased if it is imposed at a rate not higher than the maximum rate so approved.

SEC. 3. Initiative Power for Local Taxes, Assessments, Fees and Charges. Notwithstanding any other provision of this Constitution, including, but not limited to, Sections 8 and 9 of Article II, the initiative power shall not be prohibited or otherwise limited in matters of reducing or repealing any local tax, assessment, fee or charge. The power of initiative to affect local taxes, assessments, fees and charges shall be applicable to all local governments and neither the Legislature

nor any local government charter shall impose a signature requirement higher than that applicable to statewide statutory initiatives.

SECTION 4. ASSESSMENT AND PROPERTY RELATED FEE REFORM.

Article XIII D is added to the California Constitution to read:

ARTICLE XIII D

SECTION 1. Application. Notwithstanding any other provision of law, the provisions of this article shall apply to all assessments, fees and charges, whether imposed pursuant to state statute or local government charter authority. Nothing in this article or Article XIII C shall be construed to:

(a) Provide any new authority to any agency to impose a tax, assessment, fee, or charge.

(b) Affect existing laws relating to the imposition of fees or charges as a condition of property development.

(c) Affect existing laws relating to the imposition of timber yield taxes.

SEC. 2. Definitions. As used in this article:

(a) "Agency" means any local government as defined in subdivision (b) of Section 1 of Article XIII C.

(b) "Assessment" means any levy or charge upon real property by an agency for a special benefit conferred upon the real property. "Assessment" includes, but is not limited to, "special assessment," "benefit assessment," "maintenance assessment" and "special assessment tax."

(c) "Capital cost" means the cost of acquisition, installation, construction, reconstruction, or replacement of a permanent public improvement by an agency.

(d) "District" means an area determined by an agency to contain all parcels which will receive a special benefit from a proposed public improvement or property-related service.

(e) "Fee" or "charge" means any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property related service.

PROPOSITION 218

RIGHT TO VOTE ON TAXES ACT

STATEMENT OF DRAFTERS' INTENT

January 2, 1997

SECTION 1. TITLE. This Act shall be known and may be cited as the "Right to Vote on Taxes Act."

Comment: The title reflects the unifying theme -- there are three main elements of the initiative and each relates to voter and taxpayer control over local taxes. The first part of the initiative deals with general and special taxes; the second section deals with assessment reform; the third and last section deals with property related fees and charges.

SECTION 2. FINDINGS AND DECLARATIONS. The people of the State of California hereby find and declare that Proposition 13 was intended to provide effective tax relief and to require voter approval of tax increases. However, local governments have subjected taxpayers to excessive tax, assessment, fee and charge increases that not only frustrate the purposes of voter approval for tax increases, but also threaten the economic security of all Californians and the California economy itself. This measure protects taxpayers by limiting the methods by which local governments exact revenue from taxpayers without their consent.

Comment: Findings specifically refer to Proposition 13. If local governments and courts had not circumvented Proposition 13, Proposition 218 would not have been necessary.

SECTION 3. VOTER APPROVAL FOR LOCAL TAX LEVIES. Article XIII C of the California Constitution is added to the California Constitution to read:

Comment: This section sets forth provisions similar to those found in Proposition 62, Government Code Section 53720, et seq. Although Proposition 62 was upheld by the California Supreme Court in Santa Clara County Local Transportation Authority v. Guardino (Howard Jarvis Taxpayers Association, et al., Real Parties in Interest) (1995) 11 Cal.4th 220, that initiative was a statutory initiative and charter cities, for the most part, have refused to follow its mandates. On the other hand, there is no dispute that Proposition 218 applies to charter cities.

PROPOSITION 218
STATEMENT OF DRAFTERS' INTENT
PAGE 2

Article XIII C

SEC. 1. Definitions.

As used in this Article:

- (a) "General tax" means any tax imposed for general governmental purposes.
- (b) "Local government" means any county, city, city and county, including a charter city or county, any special district, or any other local or regional governmental entity.
- (c) "Special District" means an agency of the state, formed pursuant to general law or a special act, for the local performance of governmental or proprietary functions with limited geographic boundaries including, but not limited to, school districts and redevelopment agencies.

Comment: The terms "local government" and "special district" are defined broadly so as to encompass all government entities other than the state itself. These definitions are more expansive than those set forth in Proposition 62.

- (d) "Special tax" means any tax imposed for specific purposes, including a tax imposed for specific purposes, which is placed into a general fund.

Comment: The purpose of this definition is to require an analysis which looks to the purpose of the funding, not to the name on the account. See, e.g., Rider v. San Diego (1991) 1 Cal.4th 1. This provision is intended to prevent local governments from levying special taxes without a two-thirds vote simply by laundering the proceeds through a general fund. To this extent, the revised definition reverses Neecke v. City of Mill Valley (1995) 39 Cal.App.4th 946. It also would prohibit schemes which purport to authorize a "general" tax with a simple majority vote while, at the same time, propose a companion "advisory" vote on how the money should be spent. Such taxes retain their "special" characteristics under Proposition 218.

SEC. 2. Local Government Tax Limitation.

Notwithstanding any other provision of this Constitution:

- (a) All taxes imposed by any local government shall be deemed to be either general taxes or special taxes. Special purpose districts or agencies, including school districts, shall have no power to levy general taxes.

PROPOSITION 218
STATEMENT OF DRAFTERS' INTENT
PAGE 3

Comment: This provision is similar to the language of the Supreme Court in the Rider v. San Diego decision recognizing that special districts, by their special nature, have no power to levy general taxes.

- (b) No local government may impose, extend, or increase any general tax unless and until that tax is submitted to the electorate and approved by a majority vote. A general tax shall not be deemed to have been increased if it is imposed at a rate not higher than the maximum rate so approved. The election required by this subdivision shall be consolidated with a regularly scheduled general election for members of the governing body of the local government, except in cases of emergency declared by a unanimous vote of the governing body.

Comment: Under Proposition 218, a tax measure put to the voters could incorporate future increases and, if the ballot measure is approved, then the agency would not have to seek additional authorization from the voters for those increases. Also, except in cases of emergency, tax-measure elections are to be consolidated with regular elections at which members of governing bodies are chosen. A unanimous vote is needed to declare an emergency but, consistent with existing case law, this should be interpreted as a unanimous vote of those present at the meeting. The concern is that the nature of the emergency might keep some members of the local legislative body from attending a meeting.

- (c) Any general tax imposed, extended or increased, without voter approval, by any local government on or after January 1, 1995, and prior to the effective date of this article, shall continue to be imposed only if approved by a majority vote of the voters voting in an election on the issue of the imposition, which election shall be held within two years of the effective date of this article and in compliance with subdivision (b).

Comment: This provision of Proposition 218 applies to any general fund tax levied after 1994. Those taxes imposed, extended or increased without voter approval on or after January 1, 1995 which have not received majority voter approval must be approved by a simple majority vote of the electorate by November 6, 1998. The reason the drafters designated an effective date of January 1, 1995 was to prevent a "rush" of new taxes imposed prior to November 1996 designed to avoid voter approval.

The designation of the January 1, 1995 date does not, in any way, affect any potential claim against a local government entity for violations of Proposition 62. Taxes imposed prior to that date without voter approval may still be subject to

PROPOSITION 218
STATEMENT OF DRAFTERS' INTENT
PAGE 4

challenge under that initiative as well as the recent Guardino decision.

- (d) No local government may impose, extend, or increase any special tax unless and until that tax is submitted to the electorate and approved by a two-thirds vote. A special tax shall not be deemed to have been increased if it is imposed at a rate not higher than the maximum rate so approved.

Comment: This section states that any tax that is levied for a specific purpose must obtain a two-thirds vote of the electorate. These taxes include any tax impose for a specific purpose or purposes including, but not limited to, local sales taxes or parcel taxes designated for specific purposes.

SEC. 3. Initiative Power For Local Taxes, Assessments, Fees and Charges.

Notwithstanding any other provision of this Constitution, including, but not limited to Sections 8 and 9 of Article II, the initiative power shall not be prohibited or otherwise limited in matters of reducing or repealing any local tax, assessment, fee or charge. The power of initiative to affect local taxes, assessments, fees and charges shall be applicable to all local governments and neither the legislature nor any local government charter shall impose a signature requirement higher than that applicable to statewide statutory initiatives.

Comment: This section merely "constitutionalizes" the principles of Rossi v. Brown, (1995) 9 Cal.4th 688, a recent decision of the California Supreme Court upholding the right of the electorate to use the local initiative power to reduce or eliminate government imposed levies via the initiative power.

A concern has been expressed with respect to this provision's impact on existing and future bonds. The drafters believe these concerns are not well-founded. First, with respect to existing bonds, the impairment clause of the federal constitution (U.S. Const., art. I, Sec. 10(1)) would prevent a revenue stream protected thereunder from being jeopardized by an inappropriate use of the initiative power. Notwithstanding the clear application of federal law, however, Proposition 218's detractors contended, during the campaign, that there is no expressed exclusion for existing bonds under this provision. Because that part of the Right to Vote on Taxes Act dealing with assessment reform set forth in proposed Article XIID does have such an exemption, the implication is that the lack of one in Section 3 was intentional. There are two responses to this argument. First, if anything, the protection for existing assessments which are used to repay bonded debt reflects a policy of protecting those instruments. Second, the reason that there was an expressed exception in the

PROPOSITION 218
STATEMENT OF DRAFTERS' INTENT
PAGE 5

assessment provisions is that those provisions were dealing with retroactive application of the initiative. Because of that, a special effort was made to carefully detail those exemptions.

In any event, it is clear that the impairment clause would prevent extension of the initiative power to jeopardize a dedicated revenue stream used to pay existing bonded indebtedness. Indeed, the California State Treasurer called opponents of Proposition 218 "irresponsible" for their failed effort to make the credit worthiness of existing bonds an issue during the campaign.

*Proposition 218 does not greatly expand the initiative power. This power historically was intended to apply to the repeal of taxes. See, Rossi v. Brown, *supra* at 699-705. It was not until the Meyers line of cases that this even became an issue. But the Supreme Court in Rossi expressly repudiated Meyers and its progeny (Rossi at 705-711) and the goal of the proponents has simply been to place this repudiation in the California Constitution.¹*

The next issue is whether Section 3 has an impact on future bonds. For a number of reasons, any detrimental impact is wholly speculative. First, as noted above, the initiative power could not be used to impair bonds that are already sold (even if they are sold after Proposition 218 becomes effective). The concern that the new provision will put potential bond holders "on notice" that the revenue stream could be eliminated is not well-founded. The concerns expressed, in short, do not take into account the fact that the people's power of initiative is a co-extensive power with that of the legislative body. See e.g., Carlson v. Cory (1983) 139 Cal.App.3d 724 and DeVita v. County of Napa (1995) 9 Cal.4th 763. If the legislative body could be enjoined from impairing contractual rights, then so could the people.

The above does not leave the taxpayers without a remedy, however. If the taxpayers wish to preclude or limit future rate or tax increases via an initiative, they could do so prior to any valid, legally binding commitment being made by the legislative body

¹*As a side issue, the opponents claim we have greatly expanded Rossi because that case merely dealt with a tax. Our initiative, on the other hand, expressly refers to assessments and charges as well as taxes. However, the Meyers line of cases had already been found applicable to assessments and charges. See, e.g., Dare v. Lakeport City Council (1970) 12 Cal.App.3d 864. When the Supreme Court rejected Meyers, this line of cases can no longer be deemed to insulate assessments and charges from the initiative power. In this respect, Proposition 218 is consistent with current law.*

PROPOSITION 218
STATEMENT OF DRAFTERS' INTENT
PAGE 6

with respect to a particular revenue stream. For example, the one scenario where our initiative could in fact have an impact is when the bonds are authorized, but not sold. Presumably, at that point, the legislative body could decide not to sell the bonds and no "impairment" would be at issue. If this is true, then there is no policy reason why the people, using the initiative power, could not be able to impact the sale of the bonds in a similar fashion. It should be noted, however, that since Rossi was decided more than a year ago, the drafters are aware of no instance where the initiative power was even threatened to be used to stop the sale of unsold bonds.

SECTION 4. ASSESSMENT AND PROPERTY RELATED FEE REFORM.

Comment: This is the third major element of Proposition 218 which provides significant reforms in the area of assessments, fees and charges.

Article XIID is added to the California Constitution to read:

ARTICLE XIID

SEC. 1. Application.

Notwithstanding any other provision of law, the provisions of this article shall apply to all assessments, fees, and charges, whether imposed pursuant to state statute or local government charter authority. Nothing in this Article or Article XIIC shall be construed to:

- (a) Provide any new authority to any agency to impose a tax, assessment, fee or charge.
- (b) Affect existing laws relating to the imposition of fees or charges as a condition of property development.

Comment: The purpose of this provision is to leave unaffected existing laws relating to the imposition of developer fees. Although there have been abuses in this area by local governments (resulting in substantially increased housing costs), the focus of Proposition 218 is on those levies imposed simply by virtue of property ownership. Developer fees, in contrast, are imposed as an incident of the voluntary act of development. Proposition 218 should not significantly impede the ability of developers to employ "land secured financing" as a means to finance infrastructure. While assessments on developers are to be treated as any other assessment, it should be noted that Mello-Roos taxes (as special taxes consistent with the provisions of

PROPOSITION 218
STATEMENT OF DRAFTERS' INTENT
PAGE 7

Proposition 13) will still be available to developers.

One significant impact of Proposition 218 on developers is that a tax imposed on development would be subject to voter approval just like any other tax. For example, in Centex Real Estate Corp. v. City of Vallejo (1993) 19 Cal.App.3d 1358, the court upheld the legality of a so-called "excise tax" on development levied by a charter city outside the restrictions that state law places on the imposition of developer fees. Because such levies are conceded to be taxes (levied solely for the purpose of raising revenue), they would fall under the purview of Proposition 218's voter approval requirement. (Such taxes also violate Proposition 62. However, Proposition 218 does not present the yet unresolved issue regarding whether the voter approval requirements of Proposition 62 are enforceable as against charter cities).

- (c) Affect existing laws relating to the imposition of timber yield taxes.

Comment: These taxes are already addressed in the California Constitution and by legislation. The intent of Proposition 218 was to leave this entire area of law unaffected.

SEC. 2. Definitions.

As used in this article:

- (a) "Agency" means any local government as defined in subdivision (b) of Section 1 of Article XIII C.
- (b) "Assessment" means any levy or charge upon real property by an agency for a special benefit conferred upon the real property. "Assessment" includes, but is not limited to, "special assessment," "benefit assessment," "maintenance assessment" and "special assessment tax."
- (c) "Capital cost" means the cost of acquisition, installation, construction, reconstruction or replacement of a permanent public improvement by an agency.
- (d) "District" means an area determined by an agency to contain all parcels which will receive a special benefit from a proposed public improvement or property-related service.

PROPOSITION 218
STATEMENT OF DRAFTERS' INTENT
PAGE 8

- (e) "Fee" or "charge" means any levy other than an ad valorem tax, a special tax or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including user fees or charges for a property related service.

Comment: Included in covered fees and charges are levies for property related services. Such services should be broadly construed to include levies imposed for services or regulatory activities which have a nexus to the beneficial use of property including rent control fees. "Fees," for purposes of this article, are limited to levies imposed as an incident of property ownership or fees for property related services. DMV fees, statewide fees, fines, and recreation fees such as park gate fees, are not affected. However, fees for sewer, water and refuse collection, because of their connection to property, are included.

- (f) "Maintenance and operation expenses" means the cost of rent, repair, replacement, rehabilitation, fuel, power, electrical current, care, and supervision necessary to properly operate and maintain a permanent public improvement.
- (g) "Property ownership" shall be deemed to include tenancies of real property where tenants are directly liable to pay the assessment, fee, or charge in question.

Comment: Under this definition, if a tenant of real property is directly liable to pay an assessment, that tenant would have the right to protest and vote. This will depend on the terms of the lease. "Direct pass-throughs" are more common in commercial leases than in residential leases. Moreover, it would not be inappropriate for the Legislature to provide the specific guidelines with respect to the duties of the agency and property owners for the implementation of this provision.

- (h) "Property-related service" means a public service having a direct relationship to property ownership.
- (i) "Special benefit" means a particular and distinct benefit over and above general benefits conferred on real property located in the district or to the public at large. General enhancement of property value does not constitute "special benefit."

Comment: What constitutes a special benefit will depend on the nature of the capital improvement or service being provided. It must be more than a mere increase in the value of the property because, arguably, the availability of any public service could

PROPOSITION 218
STATEMENT OF DRAFTERS' INTENT
PAGE 9

provide additional value. It must a direct and special benefit conferred on the property that exceeds the benefit conferred on the public or large or even to other similar properties.

SEC. 3. Property Taxes, Assessments, Fees and Charges Limited.

Comment: This section provides an exclusive list of those levies which can be imposed on real property.

- (a) No tax, assessment, fee or charge shall be assessed by any agency upon any parcel of property or upon any person as an incident of property ownership except:
 - (1) The ad valorem property tax imposed pursuant to Article XIII and Article XIII A of this Constitution.
 - (2) Any special tax receiving a two-thirds vote pursuant to Article XIII A, Section 4.

Comment: Proposition 218 permits special taxes with a two-thirds vote consistent with Proposition 13. Although there remain significant policy issues with respect to any non-ad valorem property tax, the authors of Proposition 218 realized it would be difficult to repeal existing statutory authorization for special taxes on property as long as those taxes secured the requisite two-thirds vote. General taxes on property are not permitted on property under existing California Constitutional principles. (Article XIII, Section 1).

- (3) Assessments as provided by this article.
 - (4) Fees or charges for property related services as provided by this article.
- (b) For purposes of this article, fees for the provision of electrical or gas service shall not be deemed charges or fees imposed as an incident of property ownership.

SEC. 4. Procedures and Requirements for All Assessments.

- (a) An agency which proposes to levy an assessment shall identify all parcels which will have a special benefit conferred upon them

PROPOSITION 218
STATEMENT OF DRAFTERS' INTENT
PAGE 10

and upon which an assessment will be imposed. The proportionate special benefit derived by each identified parcel shall be determined in relationship to the entirety of the capital cost of a public improvement, the maintenance and operation expenses of a public improvement, the cost of the property related service being provided. No assessment shall be imposed on any parcel which exceeds the reasonable cost of the proportional special benefit conferred on that parcel. Only special benefits are assessable, and an agency shall separate the general benefits from the special benefits conferred on a parcel. Parcels within a district that are owned or used by any agency, the State of California or the United States shall not be exempt from assessment unless the agency can demonstrate by clear and convincing evidence that such publicly owned parcels in fact receive no special benefit.

Comment: These requirements for assessments are similar to those imposed by traditional assessment law. The overall purpose of this section is to permit assessments to be used, once again, as a legitimate financing mechanism for capital improvements and services that provides particular benefits to property and not just a means to impose flat rate parcel taxes. These requirements are: assessments must be proportional to the benefit; only special benefits are assessable; and public properties must pay their fair share. Historically, benefit assessments have also been levied on public properties. (See, e.g., Municipal Improvement Act of 1911). Only in recent years when assessments have been used to impose what are, in effect, parcel taxes, have public properties received blanket exemptions from assessments. Under Proposition 218, if public property is benefited in the same manner as private property, then it must be assessed.

- (b) All assessments must be supported by a detailed engineer's report prepared by a registered professional engineer certified by the State of California.

Comment: This requirement is consistent with traditional assessment law. Only since Proposition 13 have non-engineers been able to prepare "engineers' reports."

- (c) The amount of the proposed assessment for each identified parcel shall be calculated and the record owner of each parcel shall be given written notice by mail of the proposed assessment, the total amount thereof chargeable to the entire district, the amount chargeable to the owner's particular parcel, the duration of such

PROPOSITION 218
STATEMENT OF DRAFTERS' INTENT
PAGE 11

payments, the reason for the assessment and the basis upon which the amount of the proposed assessment was calculated, together with the date, time, and location of a public hearing on the proposed assessment. Each notice shall also include, in a conspicuous place thereon, a summary of the procedures applicable to the completion, return and tabulation of the ballots required pursuant to subdivision (d), including a disclosure statement that the existence of a majority protest, as defined in subdivision (e), will result in the assessment not being imposed.

- (d) Each notice mailed to owners of identified parcels within the district pursuant to subdivision (c) shall contain a ballot which includes the agency's address for receipt of any such ballot once completed by any owner receiving the notice whereby the owner may indicate his or her name, reasonable identification of the parcel, and his or her support or opposition to the proposed assessment.

Comment: Notice requirements for assessments have been substantially liberalized in recent years to the detriment of taxpayers. Proposition 218 requires mailed notice, not just publication in a newspaper. Mailed notice would also include a ballot to be returned by the property owners as more fully described below.

Notice of Proposed Assessment: *The procedures for processing and tabulating protests against a proposed assessment under Proposition 218 are largely set forth in the initiative. Under Proposition 218, each property owner subject to a proposed assessment must receive a written notice of the proposed assessment and a ballot to be returned to the agency indicating support or opposition to the proposed assessment.*

The notice, ballot, and return envelope must be mailed to property owners at least 45 days before the required public hearing on the assessment. During the 45 days between the time the notice is mailed and the hearing is held, the engineers report and all other pertinent materials or public records must be made available to property owners for their review, along with the address where they may review the documents. It must also set forth:

- 1) The amount proposed to be charged as an assessment against the specific parcel.*
- 2) The amount proposed to be charged as an assessment to the entire district.*

PROPOSITION 218
STATEMENT OF DRAFTERS' INTENT
PAGE 12

- 3) *The length of time the proposed assessment will be in place.*
- 4) *The reasons for the assessment and the grounds upon which the proposed assessment for the parcel was calculated.*
- 5) *The date, location and time of the required public hearing.*
- 6) *A summary of the protest procedure, including instructions for the completion and return of the ballot.*

Drafters' Suggested Procedures:

Ballot: *The ballot should remain sealed with all pertinent property owner information on the outside of the envelope so that both the signature and the information can be verified by the tabulator before the envelope is opened. The envelope should include parcel number, signature, address, sworn declaration, etc. The ballot should include the agency's address (or a self-addressed envelope, stamp at agencies discretion) for return of the ballot.*

Tabulation Procedures: *Ballots should be opened and tabulated at the end of the public hearing. Ballots can be mailed to the agency or delivered personally to the agency prior to actual ballot tabulations. Ballots are tabulated by adding the amount of the assessment on each ballot indicating either approval of, or opposition to, the assessment. If the dollar amount representing the consenting ballots exceeds the dollar amount reflective of the opposing ballots, the assessment may be imposed. In the event of a tie, the assessment cannot be imposed.*

Ballots should be retained by the agency for a sufficient period of time to permit resolution of disputes involving the ballot process. Also, nothing in Proposition 218 prohibits the use of independent private firms or public agencies to contract with the levying agency to administer the ballot process. Thus, a local agency could contract either with an accounting firm or a county registrar of voters for this purpose.

PROPOSITION 218
STATEMENT OF DRAFTERS' INTENT
PAGE 13

Preprinted ballots in the following format are recommended:

Parcel No. [preprinted from assessors tax roll]

Record Owner: [preprinted from assessors tax roll]

Address: [preprinted from assessors tax roll]

☐ *Yes, I approve of the proposed annual assessment of \$ [preprinted]
on the parcel identified on this ballot.*

☐ *No, I do not approve the proposed assessment on this parcel.*

*Signature of Record Owner or Authorized Representative in the case of
property owned by non-individuals.*

As previously noted, the Legislature may wish to provide additional details with respect to those tenants of real property who, by virtue of their lease, are directly obligated to pay an assessment. The Drafters do not recommend legislation which places the burden of determining who has the right to protest an assessment on the public agency. One possible solution is a statute providing that the property owners have an affirmative duty to inform tenants, and transmit the ballots, in those situations where the tenants are financially responsible for the payment.

Legal Issue Regarding Right to Vote

During the campaign, opponents of Proposition 218 claimed that the initiative would deprive electors of the right to vote by giving corporations (including foreign corporations) more voting power than individual voters or property owners. However, limiting the ability to protest assessments to those who own property is consistent with over one hundred years of assessment law. Similarly, Proposition 218's specific provision of "weighting" the protest votes according to the amount of the assessment is also consistent with the "weighting" formula of some existing statutes. See, e.g. Fire Suppression Assessments, Gov't Code § 50078, et seq. This formula was selected because it the most reflective of the policy that those who have to pay should have the right to affect the decision of whether the levy should be imposed. Moreover, some of the other existing "weighting" formulas, such as those based on acreage, led to some strange and inequitable results. The County of Los Angeles'

PROPOSITION 218
STATEMENT OF DRAFTERS' INTENT
PAGE 14

park assessments are prime examples.

- (e) The agency shall conduct a public hearing upon the proposed assessment not less than 45 days after mailing the notice of the proposed assessment to record owners of each identified parcel. At the public hearing, the agency shall consider all protests against the proposed assessment and tabulate the ballots. The agency shall not impose an assessment if there is a majority protest. A majority protest exists if, upon the conclusion of the hearing, ballots submitted in opposition to the assessment exceed the ballots submitted in favor of the assessment. In tabulating the ballots, the ballots shall be weighted according to the proportional financial obligation of the affected property.
- (f) In any legal action contesting the validity of any assessment, the burden shall be on the agency to demonstrate that the property or properties in question receive a special benefit over and above the benefits conferred on the public at large and that the amount of any contested assessment is proportional to, and no greater than, the benefits conferred on the property or properties in question.

Comment: Although this provision shifts burden of proof in taxpayers' favor on issue of benefits to property, it is consistent with some current case law. See, e.g., Beaumont Investors v. Beaumont-Cherry Water Dist. (1985) 165 Cal.App.3d 567.

- (g) Because only special benefits are assessable, electors residing within the district who do not own property within the district shall not be deemed under this Constitution to have been deprived of the right to vote for any assessment. If a court determines that the Constitution of the United States or other federal law requires otherwise, the assessment shall not be imposed unless approved by a two-thirds vote of the electorate in the district in addition to being approved by the property owners as required by Section 4(e).

Comment: Under existing law, it is not a violation of the right to vote to limit elections to property owners if the district provides only a narrow, property related service. So, Cal. Rapid Transit District v. Bolen (1992) 1 Cal.4th 654.

PROPOSITION 218
STATEMENT OF DRAFTERS' INTENT
PAGE 15

SEC. 5. Effective Date

Comment: Although titled "effective date," this section has some important exceptions regarding the requirements for assessments. If one of the following exceptions does not apply, then an existing assessment must cease by July 1, 1997 unless ratified by the property owners.

Pursuant to subdivision (a) of Section 10 of Article II, the provisions of this article shall become effective the day after the election unless otherwise provided. Beginning July 1, 1997, all existing, new or increased assessments shall comply with this article. Notwithstanding the foregoing, the following assessments existing on the effective date of this article shall be exempt from the procedures and approval process set forth in Section 4:

Comment: An assessment is deemed "existing on the effective date of this Article," even if it is the type of assessment which comes up for annual renewal. As long as the assessment rates and methodology remained the same from year to year, the fact that the assessment is "imposed" annually would not necessarily trigger applicability of the requirements of this Article. This would be true even if the total revenue to the district increased due to changes in land use for specific parcels (e.g., newly-created or improved parcels). Again, as long as the assessment rates and methodology remain the same, an increase in revenue as the result of land use changes would not trigger applicability of Section 4. However, the procedures and approval process of Section 4 would apply to the entire assessment in the event the assessments were increased either by the rate of assessment or by a change in methodology.

- (a) Any assessment imposed exclusively to finance the capital costs or maintenance and operation expenses for sidewalks, streets, sewers, water, flood control, drainage systems or vector control. Subsequent increases in such assessments shall be subject to the procedures and approval process set forth in Section 4.

Comment: This is the "traditional purposes" exception. These existing assessments do not need property owner approval to continue. However, future assessments for these traditional purposes are covered. The reference to "streets" does not include street lighting.

- (b) Any assessment imposed pursuant to a petition signed by the persons owning all of the parcels subject to the assessment at the time the assessment is initially imposed. Subsequent increases in

PROPOSITION 218
STATEMENT OF DRAFTERS' INTENT
PAGE 16

such assessments shall be subject to the procedures and approval process set forth in Section 4.

Comment: This provision exempts most land secured financing arrangements used by developers.

- (c) Any assessment the proceeds of which are exclusively used to repay bonded indebtedness of which the failure to pay would violate the Contract Impairment Clause of the Constitution of the United States.

Comment: Even an amendment to the California Constitution cannot impair a contract protected by the federal constitution. However, this exception can only be used for bonds that are actually protected by the impairment clause. Certificates of Participation and other creative debt instruments would not be protected. Moreover, in order to qualify for this exception, the assessment levied would have to be specifically tied to the repayment of bonds.

- (d) Any assessment which previously received majority voter approval from the voters voting in an election on the issue of the assessment. Subsequent increases in such assessments shall be subject to the procedures and approval process set forth in Section 4.

*Comment: Although the exception for assessments previously approved by the voters will permit the continued collection of some particularly illegitimate assessments, requiring an additional approval process would be redundant. It should also be noted, however, that the vote necessary to qualify for this exception **must be binding**. Advisory votes are insufficient.*

SEC. 6. Property Related Fees and Charges.

Comment: The purpose of this section is to prevent the exploitation of "fees" as a means to avoid the new restrictions on assessments. Because flat rate parcel taxes have avoided the strictures of Proposition 13 simply by being called "assessments," the drafters are concerned that the same will happen with "fees" -- that is, circumventing taxpayer protections by manipulating the label of the levy.

- (a) **Procedures for New or Increased Fees and Charges.** An agency shall follow the procedures pursuant to this section in imposing or increasing

PROPOSITION 218
STATEMENT OF DRAFTERS' INTENT
PAGE 17

any fee or charge as defined pursuant to this Article including, but not limited to, the following:

- (1) The parcels upon which a fee or charge is proposed for imposition shall be identified. The amount of the fee or charge proposed to be imposed upon each parcel shall be calculated. The agency shall provide written notice by mail of the proposed fee or charge to the record owners of each identified parcel upon which the fee or charge is proposed for imposition, the amount of the fee or charge proposed to be imposed upon each, the basis upon which the amount of the proposed fee or charge was calculated, the reason for the fee or charge, together with the date, time, and location of a public hearing on the proposed fee or charge.

Comment: This section is applicable to any fee imposed on a parcel basis or for fees which provide a property related service. It does not affect fees that are not property related such as DMV fees, park fees, or administrative charges imposed by a local government.

- (2) The agency shall conduct a public hearing upon the proposed fee or charge not less than 45 days after mailing the notice of the proposed fee or charge to the record owners of each identified parcel upon which the fee or charge is proposed for imposition. At the public hearing, the agency shall consider all protests against the proposed fee or charge. If written protests against the proposed fee or charge are presented by a majority of owners of the identified parcels, the agency shall not impose the fee or charge.

Comment: Votes on property fees and charges are not weighted in the same manner as assessments. Because fees can vary according to usage of the service, there is no workable methodology to apportion the votes of the service users. Thus, the issue of a fee increase will be determined by a simple majority vote of property owners or fee payers.

- (b) **Requirements for Existing, New or Increased Fees and Charges.** A fee or charge shall not be extended, imposed or increased by any agency unless it meets all of the following requirements:

Comment: These five requirements are applicable to all fees, including those that currently exist. In essence, these requirements mandate that fees not exceed the

PROPOSITION 218
STATEMENT OF DRAFTERS' INTENT
PAGE 18

"cost of service."

- (1) Revenues derived from the fee or charge shall not exceed the funds required to provide the property related service.
- (2) Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed.

Comment: Requirements 1 & 2 will prohibit the current practice of siphoning off fee revenue to supplement a city's general fund. This practice, sometimes known as charging an "in lieu franchise fee," currently occurs both in Los Angeles and Sacramento, as well as in many other municipalities. However, "cost of service" may also include reasonable overhead expenses as well as other items on a service bill which are necessary to provide service to the particular service user. What is included in "cost of service" will have to be determined on a case by case basis.

- (3) The amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel.

Comment: As with assessments, fees and charges, must be proportional to the actual use of the service.

- (4) No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4.

Comment: Standby charges are usually nothing more than flat rate parcel taxes imposed on the theory that water or sewer service may, at some point in the indefinite future, be available to the property being charged. This provision is a flat prohibition of such levies. However, if a current standby charge is in the nature of an assessment and can meet the more stringent "special benefit" requirements, it may take advantage of the exemption for assessments. If not, the levy would have to be reimposed as an assessment and meet all requirements of Section 5 or cease to be collected.

- (5) No fee or charge may be imposed for general governmental

PROPOSITION 218
STATEMENT OF DRAFTERS' INTENT
PAGE 19

services including, but not limited to, police, fire, ambulance or library services where the service is available to the public at large in substantially the same manner as it is to property owners.

Comment: This provision prohibits the imposition of parcel "charges" for general governmental services. The purpose of this provision is to stop those levies, such as the County of Los Angeles' parcel "charge" for library services irrespective of use of library services.

Reliance by an agency on any parcel map including, but not limited to, an assessor's parcel map, may be considered a significant factor in determining whether a fee or charge is imposed as incident of property ownership for purposes of this Article. In any legal action contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this Article.

- (c) **Voter Approval for New or Increased Fees and Charges.** Except for fees or charges for sewer, water, and refuse collection services, no property related fee or charge shall be imposed or increased unless and until such fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area. The election shall be conducted not less than 45 days after the public hearing. An agency may adopt procedures similar to those for increases in assessments in the conduct of elections under this subdivision.

Comment: This exemption for sewer, water and refuse collection is for voter approval only. Such fees must still meet all of the five substantive requirements of paragraph (b). The policy reason for this exemption is consistent with preventing end-runs around Proposition 13. Since water, sewer and refuse collection fees pre-date Proposition 13, they were exempted from voter approval.

- (d) Beginning July 1, 1997, all fees or charges shall comply with this Section.

SECTION 5. LIBERAL CONSTRUCTION. The provisions of this Act shall be liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent.

PROPOSITION 218
STATEMENT OF DRAFTERS' INTENT
PAGE 20

Comment: The purpose of this section is to ensure that, in the event of any ambiguity, the rights of taxpayers will be the paramount consideration.

SECTION 6. SEVERABILITY. If any provision of this Act, or part thereof, is for any reason held to be invalid or unconstitutional, the remaining sections shall not be affected, but shall remain in full force and effect, and to this end the provisions of this act are severable.

Comment: This provision is a standard severability clause.

U.C. BERKELEY LIBRARIES



C101697715

